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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JOHN WILSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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96 pp

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's preliminary injunction barring the Secretary of Health and Human Services from applying regulations under which a person seeking Social Security disability benefits will be found not to be disabled if he does not have a medically "severe" impairment that significantly limits his ability to do basic work activities.

PARTIES TO THE PROCEEDINGS

The petitioner is the Secretary of Health and Human Services. The named respondents are John Wilson and Mary Christopher. In addition, the district court certified the following class of plaintiffs (App., *infra*, 19a-20a, 52a):

> All persons in the State of New Jersey who have filed or will file applications for disability benefits under Title II and/or Title XVI of the Social Security Act, as amended, and whose benefits have been or will be denied or terminated based upon a finding of no severe impairment pursuant to the policies set forth in 20 C.F.R. §§ 404.1520 (c) and .1521, 416.920(c) and .921 (1983), and Social Security Ruling 82-55 (1982).
>
> The plaintiff class does not include, at this time, any such persons who received decisions of the Secretary on or before July 25, 1984 and who failed to file a Complaint in Federal District Court or to appeal to the next level of administrative review, within 60 days after the date of receipt of such decision.

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In the Supreme Court of the United States

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No.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

JOHN WILSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 796 F.2d 36. The October 28, 1985 opinion of the district court on respondents' motions for class certification and a preliminary injunction (App., *infra*, 21a-43a); the November 14, 1985 supplemental opinion of the district court (App., *infra*, 44a-50a); and the November 14, 1985 order of the district court certifying the class and granting a preliminary injunction (App., *infra*, 51a-65a), are reported at 622 F. Supp. 649.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1986, and the petition for rehearing was denied on September 3, 1986 (App., *infra*, 17a-18a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 223(d)(1)(A) and 2(A), 1614(a)(3)(A) and (B) of the Social Security Act, as codified at 42 U.S.C. (& Supp. II) 423(d)(1)(A) and (2)(A), 1382c(a)(3)(A) and (B); Sections 223(d)(2)(C) and 1614(a)(3)(G) of the Social Security Act, as added by Section 4 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800-1801 (codified at 42 U.S.C. (Supp. II) 423(d)(2)(C), 1382c(a)(3)(G)); and 20 C.F.R. 404.1520, 404.1521, 416.920 and 416.921 are reproduced at App., *infra*, 66a-73a.

STATEMENT

This New Jersey-wide class action involves the validity of regulations under which a claimant for Social Security disability benefits will be found not to be disabled if he does not have a medically "severe" impairment. The question of the validity of these regulations is already before the Court in *Bowen* v. *Yuckert*, cert. granted, No. 85-1409 (May 19, 1986).

1. Title II of the Social Security Act provides, inter alia, for the payment of insurance benefits to a person who is "under a disability" (42 U.S.C. (Supp. II) 423(a)(1)(D)). Disability benefits also are provided under the Supplemental Security Income program established by Title XVI of the Act (42

U.S.C. (& Supp. II) 1382(a)). The term "disability" is defined under both programs to mean the inability "to engage in any substantial gainful activity" by reason of a "medically determinable physical or mental impairment" (42 U.S.C. 423(d)(1)(A), 1382c (a)(3)(A)). The Act further provides that an individual "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (42 U.S.C. (& Supp. II) 423(d)(2)(A), 1382c(a)(3)(B)).

To implement these statutory definitions, the Secretary has established a five-step "sequential evaluation" process to be followed in determining whether a claimant is disabled. 20 C.F.R. 404.1520, 416.920. At step 1, the decision-maker (the state agency, administrative law judge (ALJ), or Appeals Council) determines whether the individual is engaged in work that constitutes substantial gainful activity. If so, he is found not to be disabled. 20 C.F.R. 404.1520(b), 416.920(b). If the claimant is not engaged in substantial gainful activity, the decision-maker must determine at step 2 (at issue here) whether the claimant has a medically "severe" impairment. 20 C.F.R. 404.1520(c), 416.920(c). An impairment is not "severe" if it does not "significantly limit" the claimant's physical or mental ability to do "basic work activities" (20 C.F.R. 404.1521(a), 416.921(a)), which include walking, standing and lifting; seeing, hearing and speaking; understanding and carrying out simple instructions; using judgment; responding appropriately to supervision and co-workers; and

dealing with changes in a routine work setting (20 C.F.R. 404.1521(b), 416.921(b)). If the claimant's impairment does not significantly limit his ability to do these basic work activities, he is found not to be disabled, without specific consideration of his age, education, and work experience. 20 C.F.R. 404.1520 (c), 416.920(c).[1]

If the claimant does have a "severe" impairment, the decision-maker must determine at step 3 whether the impairment is equivalent in its severity to one of the listed impairments that are automatically deemed to be disabling. 20 C.F.R. 404.1520(d), 416.920(d). If the impairment is not that severe, the decision-maker then must determine at step 4 whether the claimant is able to do his own past work; if so, he is not disabled. 20 C.F.R. 404.1520(e), 416.920(e). Finally, if the claimant cannot do his past work, the decison-maker must determine at step 5 whether, in light of the claimant's age, education, and work experience, he can perform other work that exists in the national economy. 20 C.F.R. 404.1520(f), 416.920(f).

2. On October 11, 1983, respondent Wilson brought this action under 42 U.S.C. 405(g) in the United States District Court for the District of New Jersey seeking judicial review of the Secretary's final decision denying his claim for disability benefits on

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[1] As we have explained in our brief (at 4 n.1) in *Yuckert*, the sequence in which the severity of an impairment is considered now differs somewhat under the new regulations governing the evaluation of persons who already are receiving disability benefits. 20 C.F.R. 404.1594(f), 416.994(b)(5). However, that differing sequence does not affect the question whether the absence of a medically "severe" impairment is sufficient to support a determination that a claimant is not disabled.

the ground that he did not have a "severe" impairment within the meaning of the regulations discussed above. On October 1, 1984, Wilson, joined by respondent Christopher, filed an amended complaint, seeking class certification and a preliminary injunction. App., *infra*, 22a-23a, 37a-38a.[2]

a. By order dated October 9, 1985, the district court certified a class consisting of all persons in New Jersey who have filed or will file applications for disability benefits under Title II or Title XVI of the Act and whose benefits have been or will be denied or terminated based on the absence of a severe impairment under the regulations (App., *infra*, 19a-20a). The court specified that, "at this time," the class does not include any such persons who received decisions of the Secretary on or before July 25, 1984 and who failed to appeal to the next level of administrative review or to file a complaint in district court within 60 days (*id.* at 20a). The cut-off date of July 25, 1984, was selected to comply with the requirement in 42 U.S.C. 405(g) that a claimant must seek judicial review (in this case, by means of the class representatives' motion for class certification) within 60 days of the Secretary's final decision on his claim for benefits (App., *infra*, 40a & n.15).

However, the district court dispensed with the other prerequisite to suit under 42 U.S.C. 405(g) by including in the class persons who had not ex-

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[2] At the time, respondent Christopher's claim for benefits had been denied by the ALJ on the ground that her impairment was not severe, but the Appeals Council had not yet ruled on her request for review. The Appeals Council thereafter reversed the ALJ's decision and awarded her benefits, but the district court nevertheless permitted her to be a class representative (App., *infra*, 23a n.1).

hausted their administrative remedies and obtained a decision from the Appeals Council on their individual claims for benefits (App., *infra*, 39a-43a). The court acknowledged the Secretary's argument that the class members' challenge to the severity regulations was not "substantially collateral but [was] in fact identical to plaintiffs' claims for benefits" (*id.* at 42a). But the court nevertheless believed that exhaustion could be dispensed with because, in its view, the Secretary had assumed a "fixed" position with respect to the validity of the severity regulations, thereby rendering exhaustion "futile" (*id.* at 41a), and the plaintiffs would suffer "irreparable harm" as a result of the loss of benefits while they pursued administrative remedies (*id.* at 33a-34a, 42a).

b. The district court next held that a "preliminary injunction" should issue to bar application of the severity regulations to all members of this certified class (App., *infra*, 31a-35a). The court concluded that, by virtue of the Third Circuit's then-recent decision in *Baeder* v. *Heckler*, 768 F.2d 547 (1985), the plaintiffs were likely to succeed on the merits of their challenge to the regulations (App., *infra*, 27a-31a). In *Baeder*, the court held that 42 U.S.C. (& Supp. II) 423(d)(2)(A) requires consideration of the claimant's age, education, and work experience in every case and that benefits therefore cannot be denied on the basis of medical factors alone, as the severity regulations permit. 768 F.2d at 551. The court did state in *Baeder* that it might find the regulations to be consistent with the Act if they screened out only those persons with de minimis impairments; but the court found that the regulations were not so applied (*ibid.*) and therefore held them invalid (*id.* at 553).

After *Baeder* was decided, the Secretary issued Social Security Ruling (SSR) 85-28 (1985), which makes clear that the severity regulations are intended to screen out only those claimants whose impairments could be expected to have no more than a minimal effect on their ability to work even if their age, education, and work experience were specifically considered.[3] The district court in the instant case nevertheless held that *Baeder* does not permit the Secretary to apply even a de minimis standard, as under SSR 85-28 (App., *infra*, 30a). The district court further concluded that the loss of benefits to those class members whose claims were denied because their impairments were not severe was likely to cause them irreparable injury, which outweighed the administrative burden that would be imposed on the Secretary by a preliminary injunction (App., *infra*, 32a-35a).

c. On the foregoing basis, the district court, on November 14, 1985, entered a sweeping "preliminary injunction" that enjoined the Secretary from denying or terminating benefits on the basis of the severity regulations (App., *infra*, 53a). The "preliminary injunction" also awarded retroactive relief, requiring the Secretary: (i) to send each class member whose application was denied or whose benefits were terminated at any stage of the administrative review process since July 26, 1984 a prescribed notice informing him of his right to have his claim redetermined, and (ii) to reopen and readjudicate the claims of all such class members who request that relief (*id.* at 53a-54a, 56a-57a, 61a). The court imposed time limits

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[3] SSR 85-28 is reproduced as Appendix I to the petition for a writ of certiorari (at 37a-44a) and is discussed in our brief on the mertis (at 10-11, 22, 26-27, 29 n.15, 48 n.29) in *Yuckert*.

for the identification and notification of class members (*id.* at 53a), directed the Secretary to use his best efforts to acquire new evidence and redetermine claims within specified time periods (*id.* at 53a-55a), and ordered the Secretary to make detailed, periodic reports to respondents' counsel (*id.* at 57a-59a).

3. The court of appeals affirmed the preliminary injunction (App., *infra*, 1a-4a). As an initial matter, the court of appeals declined to consider the Secretary's challenge to the district court's certification of a class that included numerous persons who did not exhaust their administrative remedies (*id.* at 4a-7a). In the court of appeals' view, a class certification issue may be decided on the appeal of a preliminary injunction under 28 U.S.C. 1292(a)(1) "only when that issue 'directly controls [the] disposition of the [preliminary injunction issue], or [when] the issues are, in some other way, inextricably bound' " (App., *infra*, 5a, quoting *Kershner* v. *Mazurkiewicz*, 670 F.2d 440 (3d Cir. 1982) (en banc) (brackets added by court)). The court concluded that the exhaustion and preliminary injunction issues are not "sufficiently interrelated" to permit consideration of the former in this case, because the preliminary injunction issue concerns only "whether the Secretary has authority to continue to apply the severity regulations in light of *Baeder* and SSR 85-28," while the exhaustion issue "would be resolved by reference to principles of administrative finality" (App., *infra*, 6a).

On the merits, the court of appeals read its prior decision in *Baeder* to require consideration of vocational as well as medical factors in *every* disability

determination and therefore to prohibit the Secretary from applying the severity regulations even if they are limited to de minimis impairments. The court therefore held that SSR 85-28 does not render the severity regulations valid. App., *infra*, 7a-12a.

REASONS FOR GRANTING THE PETITION

1. The Court has granted the petition for a writ of certiarari in *Bowen* v. *Yuckert*, No. 85-1409, to consider the validity of the regulations under which Social Security disability benefits may be denied if the claimant does not have a severe impairment. There is no occasion for the Court to grant plenary review in this case to consider the same issue. The Court therefore should hold the petition in this case and dispose of it as appropriate in light of its decision in *Yuckert*.[4]

2. The merits to one side, however, the courts below erred in several respects as regards the preliminary injunction.

a. The district court erroneously included in the class and granted relief to numerous claimants who did not exhaust their administrative remedies through the Appeals Council stage and therefore did not obtain the "final decision" of the Secretary that is a jurisdictional prerequisite to suit under 42 U.S.C. 405(g). And the district court did so even though it did not dispute the Secretary's contention that each class member's challenge to the severity regulations was not "substantially collateral" to his claim for benefits, but rather was "identical" to his challenge

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[4] We have likewise suggested that the Court hold the certiorari petitions in *Bowen* v. *Johnson*, No. 85-1442, and *Bowen* v. *Dixon*, No. 86-2, which also involve the validity of these regulations, pending the decision in *Yuckert*.

to the interlocutory decision denying his claim in reliance on those regulations. See App., *infra*, 42a.

The district court relied on two factors in dispensing with the exhaustion requirement. First, it believed that exhaustion would be futile (App., *infra*, 41a, 42a). However, this Court held in *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975), that exhaustion could *not* be dispensed with on the basis of the court's perception of futility even where the claimant challenged the constitutionality of a provision of the Social Security Act that barred the payment of benefits, an issue beyond the power of the Secretary to resolve. At least in the absence of the most compelling and "unique circumstances" (*Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), slip op. 17), it would seem to follow a fortiori that a court has no authority to dispense with the exhaustion requirement on futility grounds where the claimant challenges the validity of a regulation, which is within the power of the Secretary to determine. There are no special circumstances here that would suggest an exception to this rule. In further administrative proceedings, the Secretary would be given the opportunity to interpret and apply the regulations, and the ALJ or Appeals Council might find that the claimant's impairment is "severe" within the meaning of the challenged regulations, thereby obviating any occasion for the claimant to challenge those regulations in court.[5]

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[5] Respondents do not challenge a "secret" policy, such as that found by the Court in *City of New York*, slip op. 12-13, 17; the threshold requirement of a severe impairment is embodied in published regulations. There accordingly can be no suggestion in this case that those class members who abandoned their claims when they failed to seek further adminis-

The district court also concluded that exhaustion should be dispensed with because the members of the plaintiff class would suffer "irreparable harm" if they could not obtain immediate relief. This reasoning was equally erroneous. When the Court excused exhaustion in *City of New York*, it expressly relied upon the district court's finding that the claimants would suffer a medical setback if they were required to exhaust their administrative remedies (slip op. 15-16), such that the pursuit of administrative remedies would itself affirmatively cause them harm. Compare *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242, 244 (1980). In this case, by contrast, the only injuries relied upon by the district court were the financial consequences that result from the denial of claims for benefits on the *merits* at preliminary stages of the administrative review process. If those consequences—which any disability claimant might allege—were sufficient to dispense with exhaustion, the explicit "final decision" requirement in 42 U.S.C. 405(g) would be largely vitiated under the disability and SSI programs. Congress clearly did not intend that result when it incorporated 42 U.S.C. 405(g) and its well-established exhaustion requirement into the disability and SSI programs in 1956 and 1972. See 42 U.S.C. (& Supp. II) 421(d), 1383(c)(3).

b. The district court's error in exercising jurisdiction over the claims of, and awarding relief to, numerous class members who did not exhaust their administrative remedies was compounded by the

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trative review within 60 days—the very claims that the district court required to be readjudicated—were prevented by any action of the Secretary from seeking further review in the manner required by 42 U.S.C. (& Supp. II) 405 and implementing regulations.

court of appeals' refusal even to consider the correctness of the district court's actions in this regard. The court of appeals viewed the exhaustion issue as an incidental question of class certification that was distinct from the propriety of the preliminary injunction and therefore not within the scope of its jurisdiction under 28 U.S.C. 1292(a)(1) over the appeal from the order granting a preliminary injunction (App., *infra*, 5a-7a). This novel holding was clearly wrong.

The Secretary of course argued in district court that *no* preliminary injunction should issue in this case for reasons (relating to the merits and equitable considerations) that had nothing to do with the jurisdictional requirements of 42 U.S.C. 405(g) (App., *infra*, 31a-35a). But in addition, the Secretary argued that those New Jersey residents who failed to exhaust their administrative remedies could not properly be included in the class in this suit under 42 U.S.C. 405(g) and therefore could not properly be the beneficiaries of *any* relief ordered by the district court (App., *infra*, 39a-43a). The district court's order at issue here nevertheless grants injunctive relief to those claimants. On the Secretary's appeal of that order under 28 U.S.C. 1292(a)(1), the court of appeals plainly had jurisdiction to decide whether the injunction was improperly entered as to those plaintiffs, even if it was valid as to others—especially since the Secretary's challenge to the preliminary injunction in this regard is that the district court had no *jurisdiction* under 42 U.S.C. 405(g) over the claims of these class members. See *Salfi*, 422 U.S. at 766 (a "final decision" is a "statutorily specified jurisdictional prerequisite" under 42 U.S.C. 405(g)).

In fact, in *Heckler* v. *Lopez*, 463 U.S. 1328 (1983), the Secretary argued on appeal from a preliminary

injunction that the district court had erroneously granted relief to class members who had not exhausted their administrative remedies and whose claims therefore were not within the jurisdiction of the district court (463 U.S. at 1334-1335 (Rehnquist, Circuit Justice)). In granting a partial stay of that injunction, which the Court subsequently declined to vacate (464 U.S. 879 (1983)), Justice Rehnquist made clear that this jurisdictional issue was subject to review on appeal of the preliminary injunction (463 U.S. at 1331). The dissenting opinions of Justice Brennan and Justice Stevens likewise expressed no doubt on this issue. 464 U.S. at 879-884. Any other result would defeat the purpose of 28 U.S.C. 1292(a)(1) of permitting an immediate appeal of injunctive orders.[6]

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[6] The court of appeals believed that its refusal to consider the exhaustion issue was supported by the Third Circuit's prior decision in *Kershner* v. *Mazurkiewicz*, *supra* (App., *infra*, 5a-6a). However, the district court in that case had *denied* both the plaintiffs' motion for class certification and their motion for a preliminary injunction. Because injunctive relief was denied on grounds independent of those that led to the denial of class certification, the latter question did not affect the resolution of the preliminary injunction question. The Third Circuit therefore concluded that it did not have "pendent" jurisdiction over the class certification issue. See 670 F.2d at 459-460. In this case, by contrast, the district court *granted* the motions for class certification and for a preliminary injunction. The validity of the injunction insofar as it awards relief to class members who did not exhaust their administrative remedies therefore depends, inter alia, on whether the district court properly exercised jurisdiction over those class members' claims. For this reason, the court of appeals had jurisdiction to consider the latter question. Indeed, this case satisfies the test articulated by the court of appeals, because the question of the district court's jurisdiction " 'directly controls' " and is " 'inextricably bound' " up

c. Finally, although the district court labeled its order a "preliminary injunction," the relief granted went far beyond "the usual 'prohibitory' injunction which merely freezes the positions of the parties until the court can hear the case on the merits." *Heckler* v. *Lopez*, 463 U.S. at 1333 (Rehnquist, Circuit Justice). The courts below affirmatively barred the Secretary from utilizing the severity regulations in adjudicating *all* disability claims in New Jersey. That relief is not "preliminary" as regards any individual class member, because his claim must be either granted or denied without reference to the regulations that the district court enjoined. Cf. *Heckler* v. *Redbud Hospital District*, No. A-32 (July 24, 1985), slip op. 5-6 (Rehnquist, Circuit Justice). Moreover, those regulations rest on a principle—that benefits may be denied on the basis of medical evidence alone, without specific consideration of the claimant's age, education, and work experience—that has been an integral feature of the disability program virtually since its inception in 1956 and has been embodied in formal regulations for more than 25 years. See Gov't Br. at 30-50 in *Yuckert*. A regulation so deeply embedded in a program under which millions of claims are adjudicated annually should not be set aside until the court has rendered a final judgment in the case.

The courts below also erred in requiring, as an incident to the supposedly "preliminary" injunction, the readjudication of the claims of all class members whose claims were denied on the basis of the severity

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with the question of the award of injunctive relief (App., *infra*, 5a (quoting *Kershner*, 670 F.2d at 449)). See also *Kershner*, 670 F.2d at 447 ((district court's jurisdiction may be considered on appeal of preliminary injunction).

regulations and who thereafter failed to seek further review within the 60 days allowed. The equities do not favor the granting of relief pendente lite to persons who committed such procedural defaults in the administrative review process.

d. Although we believe that the district court's preliminary injunction and the court of appeals' affirmance of that injunction were erroneous for the additional reasons just discussed, we do not seek review on those issues at this time. There was no stay of the retroactive relief ordered by the district court, and that process has now been largely completed. All that will then remain is the prospective prohibition against the use of the regulations. If the Court sustains the severity regulations in *Yuckert*, the preliminary injunction in this case must be reversed on the merits, irrespective of the other errors committed by the courts below in granting and affirming that injunction. On the other hand, if the Court were to hold in *Yuckert* that the severity regulations are invalid, the Secretary of course would follow that decision in New Jersey, as elsewhere, thereby mooting the other questions regarding the propriety of the preliminary injunction in this case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *Bowen* v. *Yuckert*, cert. granted, No. 85-1409 (May 19, 1986).

Respectfully submitted.

CHARLES FRIED
Solicitor General

DECEMBER 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 85-5814, 86-5072

JOHN WILSON and MARY CHRISTOPHER, on their own behalf, and on behalf of others similarly situated

v.

SECRETARY OF HEALTH AND HUMAN SERVICES

Appeal of Margaret M. Heckler,
Sec. of Health and Human Services

[Argued June 17, 1986 Decided July 14, 1986]

Before SEITZ, HUNTER, and MANSMANN, Circuit Judges.

JAMES HUNTER, III, Circuit Judge:

Appellees John Wilson and Mary Christopher originally brought this action in 1984 to appeal the decisions of the Secretary of Health and Human Services (the "Secretary") denying their applications for disability insurance benefits. Appellees subsequently amended their complaint to include class action allegations and requests for declaratory and injunctive relief against the Secretary. Specifically, they challenged the Secretary's policy of denying or terminating disability benefits solely because claimants' impairments are not medically "severe" and without

consideration of claimants' age, education, work experience, residual functional capacity, or ability to return to their former work. Appellees then filed motions for preliminary injunctive relief and class certification. While these motions were pending before the district court, this court invalidated one of the Secretary's severity regulations, 20 C.F.R. § 404.-1520(c) (1985), on the ground that it was inconsistent with the Social Security Act (the "Act"). *See Baeder v. Heckler*, 768 F.2d 547 (3d Cir.1985).

After we decided *Baeder*, the Secretary defended the motions pending in the district court by contending that a policy, set forth in Social Security Ruling ("SSR") 85-28, rendered 20 C.F.R. § 404.1520(c) and the other severity regulations[1] consistent with

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[1] In addition to 20 C.F.R. § 404.1520(c), the other severity regulations at issue here are 20 C.F.R. §§ 404.1521, 416.920 (c), 416.921. These four sections provide as follows:

20 C.F.R. § 404.1520(c):

> *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

20 C.F.R. § 404.1521:

> What we mean by an impairment(s) that is not severe.
>
> (a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.
>
> (b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

our holding in *Baeder*. The district court rejected this argument and granted appellees' motions for

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(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

20 C.F.R. § 416.920(c):

You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.

20 C.F.R. § 416.921:

What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

class certification and preliminary injunctive relief. The Secretary appeals the orders of the district court, invoking our jurisdiction under 28 U.S.C. § 1292(a)(1) (1982). We will vacate in part the district court's order issuing the preliminary injunction and remand the matter to the district court.

I.

Before we discuss the merits of the district court's grant of the preliminary injunction, we initially confront the Secretary's assertion that the district court erred in certifying the class of plaintiffs. The class certified by the district court includes

> [a]ll persons in the State of New Jersey who have filed or will file applications for disability benefits under Title II and/or Title XVI of the Social Security Act, as amended, and whose benefits have been or will be denied or terminated based upon a finding of no severe impairment pursuant to the policies set forth in 20 C.F.R. §§ 404.1520(c) and .1521, 416.920(c) and .921 (1983), and Social Security Ruling 82-55 (1982).

Wilson v. Heckler, 622 F.Supp. 649, 661-62 (D.N.J. 1985). In its order, the district court also stated:

> The plaintiff class does not include, at this time, any such persons who received decisions of the Secretary on or before July 25, 1984 and who failed either to file a complaint in federal district court or to appeal to the next level of administrative review within 60 days after the date of receipt of such decision.
>
> For purposes of determining class membership, the term "person in the State of New Jersey" is defined as an individual who was domiciled in the

> State of New Jersey at the time of his or her most recent administrative decision.
>
> For purposes of determining whether disability was denied or terminated based on a finding of no severe impairment, the rationale of the final agency denial shall be controlling *except* that the rationale of the Administrative Law Judge shall be controlling where the Appeals Council denies review and has not initiated review on its own motion pursuant to 20 C.F.R. § 404.969 (1983).

Wilson, 622 F.Supp. at 662.

The Secretary argues that the district court erred by including in the class claimants who have failed to exhaust administrative remedies. As explained below, we will not rule on this argument.

Our jurisdiction in this appeal is provided by 28 U.S.C. § 1292(a)(1), which empowers this court to review district court orders "granting, continuing, modifying, refusing or dissolving injunctions." The district court's class certification ruling is pendent to the preliminary injunction order, which provides the basis for this appeal. In *Kershner v. Mazurkiewicz*, 670 F.2d 440 (3d Cir.1982) (in banc), this court held that "a pendent class certification order is not appealable under section 1292(a)(1) unless the preliminary injunction issue cannot properly be decided without reference to the class certification question." *Id.* at 449. The pendent class certification issue may be decided only when that issue "directly controls [the] disposition of the [preliminary injunction issue], or [when] the issues are, in some other way, inextricably bound." *Id.; see Tustin v. Heckler*, 749 F.2d 1055, 1065 (3d Cir.1984).

We believe that the class action and preliminary injunction issues are not sufficiently interrelated to provide us with jurisdiction to rule on the Secretary's class action contention. As appellees observe, each of the two issues are governed by different considerations. The preliminary injunction issue concerns whether the Secretary has authority to continue to apply the severity regulations in light of *Baeder* and SSR 85-28; the class certification issue, however, would be resolved by reference to principles of administrative finality.

Despite these differences, the Secretary maintains that the two issues may not be resolved separately because the district court premised its grant of a preliminary injunction on the status of the case as a class action. Specifically, the Secretary relies on the following statement by the district court:

> In light of *Baeder* and of the new SSR, the court believes that plaintiffs would prevail on the merits with respect to the requested injunctive relief. Contrary to the Secretary's assertion, the *Baeder* opinion does not "obviate the need for injunctive relief." Defendant's Supplemental Memorandum at 16. The *Baeder* court did refuse to affirm the district court's "all-encompassing" injunction barring the Secretary from conducting any proceedings whatsoever using the severe impairment regulation. *Baeder*, *supra*, 768 F.2d at 550, 553. However, the Third Circuit noted that it did so because the district court did not have the authority to issue so broad an injunction in the context of an individual disability appeal. *Id.* In contrast, the instant action is appropriate for such relief since plaintiffs seek an injunction in the context of a motion to certify a broad class of disability applicants.

Wilson, 622 F.Supp. at 654. Nothing in this passage reveals that the presence of a subclass of claimants who had failed to exhaust their administrative remedies was determinative of the court's decision to issue the injunction. We also find no language in the remainder of the opinion demonstrating that the district court would have refused to allow the suit to proceed as a class action if the subclass were excluded. Thus, it appears that the specific class certification issue raised here was not necessarily a vital component of the district court's decision to issue the injunction. While we agree with the Secretary that the two issues are related, we do not deem them inextricably connected and therefore will rule on the preliminary injunction issue alone.

II.

In granting the appellees' motion for a preliminary injunction, the district court enjoined the Secretary "from denying or terminating Social Security Disability or Supplemental Security Income Benefits due to the policies set forth in 20 C.F.R. §§ 404.1520(c) and .1521, 416.920(c) and .921 (1983), and Social Security Ruling 82-55."[2] The district court also im-

[2] According to the Secretary, this appeal does not concern SSR 82-55, which was "obsoleted" in April 1985. *See* Appellant's brief at 4 n.1. Instead, the Secretary identifies SSR 85-28 as the interpretive ruling revelant to this appeal. *See id.* at 35. Prior to granting the injunction, the district court issued an opinion in which it held that SSR 85-28, which was then unpublished, violated *Baeder's* holding. *See Wilson*, 622 F.Supp. at 650. The court, however, did not refer to SSR 85-28 in its preliminary injunction order. Nevertheless, the Secretary reports in her brief that SSR-85-28 will not be applied in New Jersey unless the district court's injunction is vacated. *See* Appellant's brief at 35 n.15.

posed timetables for, *inter alia*, identification and notification of class members, shipment of files to the New Jersey Division of Disability Determinations, and reconstruction of claims files. The Secretary not only claims that the district court erred in enjoining application of the severity regulations, but also complains that the timetables constitute improper judicial intrusion into the operation of the Department of Health and Human Services.

We may reverse a district court's order granting preliminary injunctive relief only upon finding that the district court abused its discretion or committed an error of law in issuing the requested relief. *See, e.g., Kershner*, 670 F.2d at 443; *Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 357 (3d Cir.1980). In pressing his first contention that the district court erred in enjoining the agency from applying the severity regulations, the Secretary maintains that the district court committed an error of law. Therefore, our standard of reviewing that contention is plenary. *See Tustin*, 749 F.2d at 1060.

The essence of this contention is that the district court erroneously concluded that SSR 85-28 was contrary to our *Baeder* decision. SSR 85-28 provides instructions for applying the second step of the evaluation process for determining entitlement to disability or supplemental security income benefits.[3] Under

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[3] SSR-85-28 provides, in part, as follows:

> As explained in 20 CFR, sections 404.1520, 404.1521, 416.920(c), and 416.921, at the second step of sequential evaluation it must be determined whether medical evidence establishes an impairment or combination of impairments "of such severity" as to be the basis of a finding of inability to engage in any SGA [substantial gainful activity]. An impairment or combination of impair-

ments is found "not severe" and a finding of "not disabled" is made at this step when medical evidence establishes only a slight abnormality or a combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered (*i.e.*, the person's impairment(s) has no more than a minimal effect on his or her physical or mental ability(ies) to perform basic work activities). Thus, even if an individual were of advanced age, had minimal education, and a limited work experience, an impairment found to be not severe would not prevent him or her from engaging in SGA.

The severity requirement cannot be satisfied when medical evidence shows that the person has the ability to perform basic work activities, as required in most jobs, Examples of these are walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling; seeing, hearing, and speaking; understanding, carrying out, and remembering simple instructions; use of judgment, responding appropriately to supervision, coworkers, and usual work situations; and dealing with changes in a routine work setting. Thus, these basic work factors are inherent in making a determination that an individual does not have a severe medical impairment.

. . . .

A claim may be denied at step two only if the evidence shows that the individual's impairments, when considered in combination, are not medically severe, *i.e.*, do not have more than a minimal effect on the person's physical or mental ability(ies) to perform basic work activities. If such a finding is not clearly established by medical evidence, however, adjudication must continue through the sequential evaluation process.

. . . .

At the second step of sequential evaluation, then, medical evidence alone is evaluated in order to assess the effects of the impairment(s) on ability to do basic work activities. If this assessment shows the individual to have the physical and mental ability(ies) necessary to perform

those instructions, the administrative adjudicator may apply the severity regulations, including 20 C.F.R. § 404.1520(c), which was invalidated in *Baeder*. The Secretary justifies this policy by reading *Baeder* to

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such activities, no evaluation of past work (or of age, education, work experience) is needed. Rather, it is reasonable to conclude, based on the minimal impact of the impairment(s), that the individual is capable of engaging in SGA.

By definition, basic work activities are the abilities and aptitudes necessary to do most jobs. In the absence of contrary evidence, it is reasonable to conclude that an individual whose impairments do not preclude the performance of basic work activities is, therefore, able to perform his or her past relevant work. If the medical evidence establishes only a slight abnormality(ies) which has no more than a minimal effect on a claimant's ability to do basic work activities, but evidence shows that the person cannot perform his or her past relevant work because of the unique features of that work, a denial at the "not severe" step of the sequential evaluation process is inappropriate. The inability to perform past relevant work in such instances warrants further evaluation of the individual's ability to do other work considering age, education and work experience.

Great care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step. Rather, it should be continued. In such a circumstance, if the impairment does not meet or equal the severity level of the relevant medical listing, sequential evaluation requires that the adjudicator evaluate the individual's ability to do past work or to do other work based on the consideration of age, education and prior work experience.

SSR 85-28 (footnote omitted).

provide that section 404.1520(c) is valid if applied only as a *de minimus* requirement that screens out applicants whose medical problems are "of a minimal nature." *See* Appellant's brief at 32. We disagree.

In *Baeder*, we held section 404.1520(c) invalid because the regulation's language and history of application was inconsistent with the Social Security Act's mandate that the Secretary consider both medical *and* vocational factors in deciding to award and continue benefits. 768 F.2d at 551-53. We specifically declined to follow other courts that upheld the validity of the section provided that the Secretary applied it to bar only the claims of those with *de minimus* medical complaints. *Id.* at 553. By continuing to apply section 404.1520(c) as clarified by SSR 85-28, the Secretary is following the path that we explicitly rejected.

The Secretary argues that language from *Baeder* expresses this court's acceptance of the validity of section 404.1520(c), if applied as a *de minimus* threshold. It is true that the *Baeder* court recognized that section 404.1520(c), read to apply only to applicants whose impairments could never prevent them from working, may be found to contain implicit consideration of vocational factors as required by the Social Security Act. *Id.* at 552. Nevertheless, in light of the history of the severity regulations and statistical evidence of their application, the *Baeder* court decided against permitting such a tenuous accommodation of the Act's mandate.[4] Thus, the district

[4] We also note that subsequent opinions of this court should not be read as deviating from the *Baeder* court's decision that as a matter of general policy, the severity regulations cannot be justified under the Act as setting forth only a *de minimus* threshold.

court correctly concluded that *Baeder* did not present the Secretary with an opportunity to develop a *de minimus* standard, as SSR 85-28 attempts to do. *See Wilson*, 622 F.Supp. at 653. As the district court held, *Baeder's* invalidation of section 404.1520(c) forecloses the Secretary from applying that regulation in any way.[5]

III.

We finally turn to the Secretary's contention that the district court improperly imposed time deadlines on him in violation of the decision in *Heckler v. Day*, 467 U.S. 104, 104 S.Ct. 2249, 81 L.Ed.2d 88 (1984). We review this contention under the abuse of discretion standard. *See Tustin*, 749 F.2d at 1060; *see also Day*, 104 S.Ct. at 2253.

In *Day*, the Supreme Court invalidated an injunction issued in a class action that imposed deadlines on the Secretary to issue reconsideration determinations and conduct hearings. Recognizing that Congress had repeatedly considered and rejected imposing mandatory deadlines on agency adjudication of disputes in disability claims under Title II of the Social Security Act, the *Day* Court ruled that "it would be an unwarranted judicial intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines with respect to future disability claims." *Id.* at 2258.

In the instant case, the district court carefully considered the scope of *Day's* proscription of setting time limits on the Secretary's administrative process.

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[5] Because we conclude that SSR-85-28 violates the holding of *Baeder*, we need not address appellees' contention that SSR-85-28 is unlawful because the Secretary failed to comply with the procedural safeguards of the Administrative Procedure Act and Social Security Act.

In fashioning its order granting injunctive relief, the district court distinguished between time limits on the Secretary's internal procedures for claim adjudication and limits relating to implementation of the injunction. Contrary to the Secretary's assertion, the court did not impose mandatory deadlines on the shipment and reconstruction of claims files. As for other actions concerning the Secretary's internal adjudicatory procedures, the court required only the Secretary's "best efforts" in meeting the court's time guidelines. The court made clear that compliance with these guidelines was "hoped for, but not required." *Wilson*, 622 F.Supp. at 660. The Secretary also maintains, however, that the timetables for identification and notification of class members violated *Day*. Although the deadlines for these actions were mandatory, we believe that the district court properly classified these actions separately from those concerning the Secretary adjudicatory procedures. In establishing mandatory deadlines for identifying and notifying class members, the court sought only to insure that claims denied under the invalid severity regulations would be placed in a position to be redetermined.[6] Accordingly, we hold that the district court did not contravene the teachings of *Day* in issuing its order.

IV.

For the reasons explained above, we find no error in the district court's decision to issue a preliminary

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[6] We further note that prior to granting the preliminary injunction, the district court solicited the Secretary's suggestions on the timing of the injunctive relief. In setting the mandatory deadlines in its order, the court deferred to the Secretary and, for the most part, adopted his suggestions. *See Wilson*, 622 F.Supp. at 660-61.

injunction in this case. Nor do we believe that the district court abused its discretion in establishing timetables for effecting the relief it granted. We nevertheless find that the following language from the court's November 14, 1985 order may be read to provide for a preliminary injunction that is broader than the court had authority to issue:

> It is FURTHER ORDERED that plaintiffs' motion for a preliminary injunction is GRANTED and that, pending a final determination of this action, defendant, her agents, servants, employees and their successors:
>
> 1. Are enjoined from denying or terminating Social Security Disability or Supplemental Security Income benefits due to the policies set forth in 20 C.F.R. §§ 404.1520(c) and .1521, 416.920(c) and .921 (1983), and Social Security Ruling 81-55 (1982). . . .

This paragraph does not indicate that the injunction covers only the Secretary's adjudication of claims submitted by persons in the State of New Jersey. Because the class of plaintiffs in this action is confined to individuals who were domiciled in New Jersey at the time of their most recent administrative decision, we hold that the scope of preliminary injunction should be similarly circumscribed. *Cf. Baeder*, 768 F.2d at 553. Therefore, we will vacate the above-quoted portion of the November 14, 1985 order of the district court and will remand the matter for clarification of the preliminary injunction's scope. The November 14, 1985 order will be affirmed in all other respects.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-5814 and 86-5072

JOHN WILSON and MARY CHRISTOPHER, ET AL.

v.

SECRETARY OF HEALTH AND HUMAN SERVICES

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 3, 1986.

/s/ [Illegible]
Circuit Judge

Dated: Aug. 18, 1986

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-5814 and 86-5072

JOHN WILSON, ET AL.

v.

SECRETARY OF HEALTH AND HUMAN SERVICES

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until December 2, 1986.

/s/ [Illegible]
Circuit Judge

Dated: September 16, 1986

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5814
No. 86-5072

JOHN WILSON and MARY CHRISTOPHER,
on their own behalf, and on behalf
of others similarly situated, APPELLEES

v.

OTIS R. BOWEN, M.D.
SECRETARY OF HEALTH AND HUMAN SERVICES,
APPELLANT

(Civil Action No. 83-3771—D.N.J.—Camden)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, and HUNTER, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ [Illegible]
Circuit Judge

DATED: Sept. 3, 1986

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-3771

JOHN WILSON and MARY CHRISTOPHER, on their own behalf, and on behalf of others similarly situated, PLAINTIFFS

v.

HON. MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

[Filed Oct. 10, 1985]

ORDER

This matter having come before the court on the 9th day of October, 1985; and

The court having considered the submissions and arguments of the parties, with a full opinion to be issued within ten (10) days,

It is on this 9th day of October, 1985, hereby ORDERED that:

1. Plaintiffs may maintain this action as a class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2), the class being defined as follows:

> All persons in the State of New Jersey who have filed or will file applications for disability bene-

fits under Title II and/or Title XVI of the Social Security Act, as amended, and whose benefits have been or will be denied or terminated based upon a finding of no severe impairment pursuant to the policies set forth in 20 C.F.R. §§ 404.1520(c) and .1521, 416.920(c) and .921 (1983), and Social Security Ruling 82-55 (1982).

The plaintiff class does not include, at this time, any such persons who received decisions of the Secretary on or before July 25, 1984 and who failed to file a Complaint in Federal District Court or to appeal to the next level of administrative review, within 60 days after the date of receipt of such decision.

2. The parties shall submit a joint proposed order for injunctive relief to the court within three (3) weeks. If the parties are unable to fashion a mutually satisfactory order, each shall submit its own version and the court will determine the appropriate scope of and timetable for injunctive relief.

No costs.

/s/ Stanley S. Brotman
STANLEY S. BROTMAN
U.S.D.J.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-3771

JOHN WILSON and MARY CHRISTOPHER, on their own behalf, and on behalf of others similarly situated, PLAINTIFFS

v.

HON. MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

[Filed. Oct. 28, 1985]

OPINION

BROTMAN, District Judge

This is an action for declaratory and injunctive relief against the Secretary of Health and Human Services ("Secretary"), challenging her policy of denying or terminating disability benefits under the Supplemental Security Income ("SSI") and Old Age Survivor and Disability Insurance ("OASDI") programs solely on the basis that claimants' impairments are not medically "severe" and without any consideration of each claimant's age, education, work experience, residual functional capacity or ability to return to his or her former work. In July 1985, the Third Circuit declared the Secretary's non-severe impairment regulation, 20 C.F.R. § 404.1520(c), —and, implicitly, the challenged policy—invalid. *Baeder v. Heckler*, 768 F.2d 547 (3rd Cir. 1985).

The Secretary did not appeal the *Baeder* decision and defends against the instant motions for class certification and preliminary injunctive relief by contending that her new policy, as articulated in an as yet unpublished interpretive ruling, fully complies with the Third Circuit's holding. For the reasons discussed in this opinion, the court finds that the Secretary's new policy directly contradicts the holding of *Baeder*. Plaintiffs' motions for class certification and preliminary injunctive relief will be granted.

I. *Procedural Background*

John Wilson initiated this action on October 11, 1983 when he appealed the denial of his application for disability insurance and SSI benefits to this court. That denial was based on a finding that Wilson suffered from no severe medical impairment; the Ad-

ministrative Law Judge ("ALJ") never considered vocational factors. Plaintiff Mary Christopher was also denied disability and SSI benefits at the administrative level on the grounds of no severe medical impairment without consideration of vocational factors. Christopher's administrative appeal was pending before the Appeals Council when she joined Wilson as a named representative of the proposed class.[1]

On October 1, 1984, plaintiffs filed motions for leave to file an amended complaint, preliminary injunctive relief and class certification. After two rounds of briefs, the court heard oral argument on those motions on December 7, 1984 and reserved decision. On February 1, 1985, the court issued an opinion and order which allowed plaintiffs to incorporate new documentary material into the record but did not address the central issues. In August, at the court's request, the parties submitted supplemental comments in light of the Third Circuit's July 24, 1985 decision in *Baeder v. Heckler*, 768 F.2d 547 (3rd Cir. 1985).

After the Secretary decided not to seek further appellate review of *Baeder*, she presented to Hon. Clarkson S. Fisher, Chief Judge of the District of

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[1] Pursuant to that appeal, the Appeals Council reversed the ALJ and granted Christopher's application for benefits. Defendant argues that Christopher is therefore an improper representative for the proposed class. Plaintiffs argue, and the court agrees, that Christopher may continue to represent the class because she was a valid representative when the motion for class certification was filed in October 1984. Moreover, the court notes that if Christopher's successful appeal were a bar to her ability to represent the class, the Secretary could hypothetically moot this and similar actions merely by granting benefits to the named plaintiffs and their replacements.

New Jersey, an order to show cause why all identified cases pending in the district should not be consolidated and remanded for review in accordance with *Baeder*. Chief Judge Fisher signed the order on September 16, 1985, making it returnable October 10, 1985.[2]

In light of Chief Judge Fisher's order, plaintiffs requested that this court accelerate its consideration of the instant motions for class certification and preliminary injunctive relief. At a September 26, 1985 conference with both parties, this court entered an order to show cause, returnable October 9, 1985, why class certification and preliminary injunctive relief should not be granted. On that date, the court also signed an order allowing plaintiffs to file their amended class action complaint.

After oral argument at the October 9, 1985 hearing, this court entered an order which certified the proposed class under Fed. R. Civ. P. 23(a) and 23(b)(2) and instructed the parties to submit a joint proposed order for injunctive relief to the court within three weeks.[3]

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[2] Cases invoking the severity regulation which were pending before the Hon. Dickinson R. Debevoise are already being remanded pursuant to an earlier order to show cause signed by Judge Debevoise on September 10, 1985. Similarly, on May 10, 1985, the Hon. Harold A. Ackerman issued an order to show cause and subsequently remanded cases pending before him despite the pending appeal in *Baeder*, in light of the district court's decision in that case. *Baeder v. Heckler*, Civ. No. 83-3338 (D.N.J. 1984) (Gerry, J.).

[3] The order defined the class as follows:

> All persons in the State of New Jersey who have filed or will file applications for disability benefits under Title II and/or Title XVI of the Social Security Act, as amended,

II. *Statutory Framework*

The Social Security Act ("Act") defines "disability" as "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Under the Act, a person is considered disabled "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A).

Regulations promulgated by the Secretary under the Act set forth a five-step sequential evaluation procedure to determine whether a claimant is dis-

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and whose benefits have been or will be denied or terminated based upon a finding of no severe impairment pursuant to the policies set forth in 20 C.F.R. §§ 404.1520(a) and .1521, 416.920(c) and .921 (1983), and Social Security Ruling 82-55 (1982).

The plaintiff class does not include, at this time, any such persons who received decisions of the Secretary on or before July 25, 1984 and who failed to file a Complaint in Federal District Court or to appeal to the next level of administrative review, within 60 days after the date of receipt of such decision.

The order further provided that if the parties were unable to fashion a mutually satisfactory order, each should submit its own version so the court could determine the appropriate scope of and timetable for injunctive relief.

The court notes that SSR 82-55 was rescinded (or, in the words of the Secretary, "obsoleted without replacement") by SSR 85-III-II (April 1985).

abled. 20 C.F.R. § 404.1520(a)-(f). The first step of the sequential evaluation requires the claimant to demonstrate that he is not currently working.[4] If he is, the claim will be denied at that point. 20 C.F.R. § 404.1520(b). Second, the claimant must show, solely on the basis of medical evidence, that his impairment is "severe." In other words, unless the impairment "significantly limits [his] physical or mental ability to do basic work activities," the claim will be denied summarily, without reference to the claimant's age, education and work experience. 20 C.F.R. § 404.1520(c).[5]

Third, if the impairment is as severe as those listed in Appendix 1 of the regulations, 20 C.F.R. Part 404, Subpart P, the claimant will receive benefits without regard to vocational factors. 20 C.F.R. § 404.1520 (d).[6] Fourth, if the impairment is less severe than those listed in Appendix 1, the claimant must show that his impairment impedes him from performing

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[4] Since the Secretary's regulations use the masculine pronoun to refer to all categories of claimants, this court will do likewise. No gender bias is intended or should be inferred.

[5] The severity regulation, 20 C.F.R. § 404.1520(c), reads in full:

> (c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not have a severe impairment.

[6] Appendix 1 fills 33 pages in the Code of Federal Regulations with detailed criteria for determining whether a particular impairment qualifies as severe.

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his past work. If he can perform his past work, his claim will be denied at this fourth step. 20 C.F.R. § 404.1520(e). Fifth, if the claimant cannot perform his past work, the Secretary must consider his "residual functional capacity" (i.e. the level of work he can perform, based on medical evidence, despite his impairment), age, education, and prior work experience. 20 C.F.R. § 404.1520(f).

In *Baeder*, the Third Circuit held that the severity regulation, 20 C.F.R. § 404.1520(c), which is the second step of the sequential evaluation, "is inconsistent with the Social Security Act, and therefore, is invalid." *Baeder, supra,* 768 F.2d at 553. The *Baeder* court reviewed the regulation's language and history as well as statistical evidence in reaching its decision. This court need not repeat the analysis, except to note that since 1982, "a full forty percent" of disability applicants have been denied benefits without any evaluation of their age, education or past relevant work experience. *Id.* at 552. The Third Circuit summarized the reasons for its holding as follows:

> We believe that section 1520(c) of the regulations does more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working. It also allows the Secretary to bypass a full-scale evaluation, which would consider and relate both medical and vocational factors, of an applicant who might actually be entitled to benefits were his age, education and work experience considered. We cannot analyze the severity regulation except according to its plain language and the manner in which the Secretary uses it. We will not rewrite the regulation to make it conform to

> the statutory mandate, although other courts have directed the Secretary to apply the regulation only to bar the claims of those with *de minimis* medical complaints.

Id. at 553 (footnotes and citations omitted).

In *Baeder*, the Secretary tried to justify the severe impairment regulation as a *de minimus* standard intended only to screen out those applicants whose medical problems "could not possibly prevent them from working." *Id.* at 552. The Secretary further contended that as applied, the regulation's scope extended to a consideration of vocational factors. The Third Circuit posited that if the Secretary were to apply the regulation in that way, it "might find that it implicitly considered vocational factors and therefore was consistent with the statute." *Id.* But because the court expressly found that the Secretary was not applying the severity regulation as a *de minimis* requirement, it did not hesitate to invalidate the regulation.

In the instant case, the Secretary argues that class certification and preliminary injunctive relief are unnecessary because she has voluntarily requested that all pending cases in the District of New Jersey which involve the severity regulation be remanded for review "in accordance with *Baeder*." Defendant's Supplemental Memorandum at 3. In support of her argument that she intends "to review these claims on remand in a manner acceptable to the [Third Circuit]," the Secretary proffers a new Social Security Ruling ("new SSR") that was signed on September 17, 1985 and will be issued and applied shortly. The new SSR, as yet unnumbered, purports to interpret and clarify the Secretary's policy regarding the

severity of impairments and to reflect recent circuit court decisions, including *Baeder*. *See* SSR, *Titles II and XVI: Medical Impairments That Are Not Severe*, Exhibit I to Defendant's Supplemental Memorandum.

The Secretary's interpretation of *Baeder*, as outlined in the new SSR, is that the severity regulation may still be applied as a *de minimis* standard, taking certain vocational factors into account at the second step of the sequential evaluation. The court emphatically disputes that interpretation.

After describing the regulation's legislative and semantic history, the new SSR describes itself as "part of the ongoing reevaluation [which] interprets and clarifies the current policy on not severe impairment, describes the threshold intended, and reflects recent legislation." New SSR at 4. The new SSR adds that its purpose is "to clarify that [the Social Security Administration's] policy is consistent with various court decisions," *id.*, in particular *Stone v. Heckler*, 752 F.2d 1099 (5th Cir. 1985), *Estran v. Heckler*, 745 F.2d 340 (5th Cir. 1984), and *Baeder*. While the new SSR may well comply with the Fifth Circuit's holdings in *Stone* and *Estran*, it directly contradicts the Third Circuit's holding in *Baeder*. In fact, even in asserting its alleged compliance with *Baeder*, the new SSR boldly lifts the Third Circuit's language and quotes it wholly out of context.

The new SSR states flatly that *Baeder* suggested that "the severity regulation is *to do no* 'more than allow the Secretary to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working.' " New SSR at 5, citing *Baeder*, *supra*, 768 F.2d at 553 (emphasis added). The three underscored

words surreptitiously replace one verb—"does"—and thus the sentence completely misrepresents the Third Circuit's original meaning.[7] This court will not countenance the Secretary's blatant manipulation of the Third Circuit's language and intent. The Secretary's interpretation of *Baeder*, as explained at length in the new SSR, can simply not be supported by the Third Circuit's plain language. The Third Circuit *invalidated* the severity regulation and barred the Secretary from applying it in *Baeder*'s case. It went further and noted that its opinion "compels this court to overturn any denial of benefits made because the Secretary and the ALJ concluded that the applicant's impairment was not severe enough, without reference to vocational factors, to meet 20 C.F.R. § 404.1520(c)." *Baeder, supra*, 768 F.2d at 553, n.5.

Baeder did not present the Secretary with an opportunity to develop a *de minimis* standard, as she purports to do in the new SSR. Rather, the court indicated that had the Secretary applied the regulation in a *de minimis* fashion in the past instead of using it as an unreasonably high threshold, it might then have upheld that past practice. *Baeder*'s invalidation of 20 C.F.R. § 404.1520(c) simply forecloses the Secretary from applying or interpreting that section in any way.

Ordinarily, the judicial review of regulations promulgated under the Act is limited to whether the regulations exceed the Secretary's statutory authority and whether they are arbitrary and capricious. *Heckler v. Campbell*, —— U.S. ——, 103 S.Ct. 1952, 1957

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[7] The original sentence read: "We believe that section 1520(c) of the regulations *does more* than allow the Secretary to deny benefits summarily. . . ." 768 F.2d at 553 (emphasis added).

(1983). Because the Third Circuit has already ruled on the invalidity of the non-severe impairment regulation, and because the new SSR continues to apply the invalidated regulation, the court holds that the new SSR is arbitrary and capricious for its patent disregard of Third Circuit precedent.[8]

III. *Preliminary Injunctive Relief*

Plaintiffs seek a preliminary injunction (1) prohibiting the Secretary from denying or terminating OASDI or SSI benefits due to the asserted non-severity of the claimant's impairments; (2) directing the Secretary to initiate or restore payments of benefits to all members of the proposed class who (a) received decisions denying or terminating benefits that were rendered at any stage of the administrative process on or after July 26, 1984; or (b) had pending challenges to such decisions on July 26, 1984; and (3) directing the Secretary to reopen the applications of all class members whose applications for benefits have been denied at any stage of the administrative process since July 26, 1984 and to redetermine those applications without reference to 20 C.F.R. § 404.1520(c).

The standard for evaluating a motion for a preliminary injunction was recently reiterated by the

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[8] Plaintiffs also contend that the new SSR is unlawful because the Secretary violated the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553, by failing to inform the public that the new ruling represents a major change in the substantive standards by which disability benefit claims will be evaluated. In view of the court's conclusion that the new SSR contradicts the holding of *Baeder* by continuing to apply the invalidated severity regulation, the APA issue need not be reached.

Third Circuit in *Si Handling Systems, Inc. v. Heisley*, 753 F.2d 1244 (3rd Cir. 1985). The court must consider four factors: (1) whether the moving party has shown a reasonable probability of success on the merits; (2) whether the moving party will suffer irreparable injury if preliminary injunctive relief is denied; (3) whether the balance of hardships tips toward or away from the moving party; and (4) whether granting preliminary relief would be in the public interest. *See also Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 958, 959 (3rd Cir. 1984); *Continental Group v. Amoco Chemicals Corp.*, 614 F.2d 351, 356, 357 (3rd Cir. 1980).

In light of *Baeder* and of the new SSR, the court believes that plaintiffs would prevail on the merits with respect to the requested injunctive relief. Contrary to the Secretary's assertion, the *Baeder* opinion does not "obviate the need for injunctive relief." Defendant's Supplemental Memorandum at 16. The *Baeder* court did refuse to affirm the district court's "all-encompassing" injunction barring the Secretary from conducting any proceedings whatsoever using the severe impairment regulation. *Baeder, supra*, 768 F.2d at 550, 553. However, the Third Circuit noted that it did so because the district court did not have the authority to issue so broad an injunction in the context of an individual disability appeal. *Id.* In contrast, the instant action is appropriate for such relief since plaintiffs seek an injunction in the context of a motion to certify a broad class of disability applicants.

Denial or termination of disability benefits can cause immediate, irreparable injury that cannot be compensated by a retroactive award at some future date. Before named plaintiff Christoper was awarded

benefits by the Appeals Council, she had no independent source of income and relied solely on her husband's Social Security retirement benefits and other savings. She had foregone new clothes and medical care and had closed off several rooms of her house to save energy costs. Affidavit of Mary Christopher, September 7, 1984 ("Christopher Aff."). Named plaintiff Wilson and his wife share a combined Social Security retirement income of $741.00 a month. To stretch that stipend, he sometimes helps a friend collect waste cardboard for between $7.00 and $10.00 a week. Wilson too has foregone regular medical treatment because he lacks the Medicare insurance for which an award of disability benefits would qualify him. Affidavit of John Wilson, October 1, 1984 ("Wilson Aff.").

The proposed class encompasses people who are elderly, sick, disabled and poor. In many, if not most, cases, the physical and mental suffering that prompts a person to seek disability benefits is accompanied by economic hardship when those benefits are terminated or denied.[9] In similar cases, several courts have concluded that the loss of benefits constitutes irreparable harm. *See, e.g., Lopez v. Heckler*, 572 F. Supp. 26 (C.D. Cal. 1983) ("Retroactive relief [for plaintiffs] would be inadequate and perhaps too late, to insure that the purpose of Social Security benefits, i.e., provision of a minimum standard of living for the poor and disabled, will be served."),

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[9] Defendant argues that in contrast to people whose benefits are terminated, people whose initial applications are denied suffer no financial hardship because they never received any benefits and thus never relied on them as a source of income. The court rejects this argument for the reasons set forth in the body of this opinion.

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aff'd in part, rev'd in part, 725 F.2d 1489 (9th Cir. 1984), *cert. granted, case vacated and remanded*, —— U.S. ——, 105 S.Ct. 583 (1984); *Leschniok v. Heckler*, 713 F.2d 520, 524 (9th Cir. 1983) ("We fail to comprehend the Secretary's argument that financial compensation at some future date should the claimants survive and prevail, mitigates the hardship which is visited upon claimants and their families each and every day."); *Caswell v. Califano*, 583 F.2d 9, 14 (1st Cir. 1978) ("It is simply not true that a claimant for disability benefits, not infrequently in dire financial circumstances due to his disability, is truly made whole by retroactive payments which he ~~has had~~ had to survive well over a year without."); *Tustin v. Heckler*, 591 F. Supp. 1049 (D.N.J.), *vacated in part and remanded*, 749 F.2d 1055 (3rd Cir. 1984) (plaintiffs face a "future injury of uncertain date and incalculable magnitude" if the terminated benefits are not restored).

The Secretary does not argue strongly that the balance of hardships tips in her favor. She contends that preliminary injunctive relief will impose a tremendous administrative burden, but this argument is effectively mooted since the court has provided the Secretary with an opportunity to participate in drafting a joint proposed order specifically so that she may suggest time limits that will not be unduly burdensome for, *inter alia*, notifying class members, reopening cases and holding hearings. Even if the Secretary were to argue that the administrative expense were prohibitive, the court would not be persuaded to deny preliminary relief. "Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plain-

tiffs' favor." *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (emergency motion for partial stay pending appeal in *Lopez*, *supra*, 572 F. Supp. 26, denied).

The public good strongly favors the issuance of an injunction ensuring that individuals who are disabled are not summarily denied by virtue of the Secretary's applications of an arbitrary and decidedly illegal threshold severity test. Thus, at least two other courts have issued preliminary injunctions in class action challenges to these severity regulations. *Dixon v. Heckler*, No. 83 Civ. 7091 (S.D.N.Y. June 22, 1984); *Smith v. Heckler*, 595 F. Supp. 1173 (E.D. Cal. 1984).

Plaintiffs argue additionally that preliminary injunctive relief is necessary in light of the Secretary's policy of nonacquiescence in judicial decisions interpreting the Act. *See Stieberger v. Heckler*, No. 84-130 (S.D.N.Y. August 19, 1985); *Kuehner v. Schweiker*, 717 F.2d 813, 816 (3rd Cir. 1983). The Secretary contends that her new SSR contradicts any suggestion of nonacquiescence since it specifically announces the Secretary's intent to comply with decisions of the Third and Fifth Circuits. However, as discussed at length *supra*, the new SSR in no way complies with either the letter or the spirit of *Baeder*. Accordingly, the court finds that the new SSR represents a policy of constructive nonacquiescence and agrees with plaintiffs that preliminary injunctive relief is strongly warranted.

IV. *Class Certification*

A. *Fed. R. Civ. P. 23*

Plaintiffs move to certify the proposed class under Fed. R. Civ. P. 23(a) and 23(b)(2) and have shown that they satisfy the four requirements—numerosity,

commonality, typicality and adequacy of representation—of Rule 23(a).

The proposed class would be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Statistics for the fifteen months since July 26, 1984 (the date the class opens) are not part of the record, but since 1979, when the non-severe impairment regulations were promulgated, the percentage of denials at this second step has hovered around 40 percent.[10] In the fiscal year 1982, for example, the most recent year for which the parties have supplied numerical data, the Secretary made nearly 900,000 initial disability determinations on Title II claims, of which 72 percent were denied. Forty percent of these denials—261,000—were based on a finding that the claimant suffered from no severe medical impairment, so vocational factors were never considered. The court takes judical notice of the fact that approximately three percent (3%) of the nation's population lives in New Jersey.[11] Therefore, in fiscal year 1982, it is probable that more than 7,000 disability applicants were denied because the Secretary applied the regulation the Third Circuit invalidated in *Baeder*. While plaintiffs have not identified all members of the proposed class—indeed, they cannot, and part of the requested injunctive relief will direct the Secretary to identify class members—they have satisfied the numerosity requirement. *See*

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[10] House Comm. on Ways and Means, 98th Cong., 1st Sess., Background Material and Data on Major Programs Within Jurisdiction of the Committee on Ways and Means, at 79 (Table 3) (Comm. Print Feb. 8, 1983).

[11] New Jersey has 17 of the nation's 538 electoral votes, which are distributed based on census data. Seventeen is aproximately three percent of 538.

Lugo v. Heckler, 98 F.R.D. 709, 714 (E.D. Pa. 1983); *Johnson v. Heckler*, 593 F. Supp. 375 (N.D. Ill. 1983), *motion to alter or amend order denied*, 607 F. Supp. 875 (1984).

In considering the requirements of commonality, typicality and adequacy of representation, the court looks first at the named plaintiffs and how the challenged policies have affected them. Wilson, a junkyard laborer for 40 years, suffers from, *inter alia*, asthma, chronic obstructive lung disease, and osteoarthritis. The ALJ called Wilson's asthmatic condition a non-exertional environmental restriction, despite evidence that Wilson's past work environment aggravated his pulmonary ailments. Wilson Aff. The ALJ never considered the severity of Wilson's impairments in combination, never determined his residual functional capacity, and denied his claim summarily at the second step of the sequential evaluation. The Appeals Council upheld the ALJ's decision and Wilson's judicial appeal has been pending in this court since 1983.

Although plaintiff Mary Christopher's initial denial was recently reversed by the Appeals Council on other grounds, her appeal was pending at the time the motion for class certification was filed. As discussed *supra*, she may continue as a proper class representative. The ALJ found that Christopher had degenerative joint disease of the neck but that she did not suffer from a severe impairment and was therefore not eligible for disability benefits, despite a consulting physician's report finding a radiculopathy from the cervical area to the left shoulder and arm.[12] Christopher had worked for 40 years as a sewing

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[12] "Radiculopathy" is a disease of the nerve roots. *Dorland's Illustrated Medical Dictionary* (25th Ed. 1974).

machine operator and stopped in 1982 because she could no longer lift her left arm. Regardless of the testimony of a vocational expert to that effect, the ALJ never considered vocational factors or determined Christopher's residual functional capacity. *See* Christopher Aff.

Like members of the class they propose to represent, the named plaintiffs were denied benefits because the Secretary applied the regulation which the Third Circuit invalidated in *Baeder*. They seek the opportunity to have the final determination of disability focus on all relevant factors mandated by the Act. There is no potential for conflict among class members because all of them want their individual cases to be evaluated fairly, with all relevant factors taken into account. Furthermore, plaintiffs' counsel has considerable experience in Social Security litigation and will ably represent the interests of the class. Declaration of Richard Yaskin, October 1, 1984, ¶¶ 14-16. Accordingly, the commonality, typicality and adequacy of representation requirements of Fed. R. Civ. P. 23(a) are satisfied.

Plaintiffs have defined the class by reference to the scope of the Secretary's challenged policies. It is clear that the Secretary has acted or refused to act on grounds generally applicable to the class, thereby making injunctive or declaratory relief with respect to the class as a whole appropriate. Fed. R. Civ. P. 23(b)(2). *See Alliance to End Repression v. Rochford*, 565 F.2d 975, 978 (7th Cir. 1977).

Two other district courts have recently certified class actions which challenged the severity regulations at issue here. *Dixon, supra*, No. 83 Civ. 709 (S.D.N.Y. June 22, 1984); *Smith, supra*, 595 F. Supp. 1173. District judges in New Jersey have also

certified class actions challenging other applications of the Secretary's regulatory authority. *Tustin, supra*, 591 F. Supp. 1049; *Rivera v. Heckler*, No. 82-3331 (D.N.J. 1983) (Lacey, J.). *See generally Kuehner v. Schweiker*, 717 F.2d 813 (3rd Cir. 1983).

8. *The Jurisdictional Requirement of § 405(g)*

A class may be certified under the Act only if each prospective class member individually satisfied the jurisdictional requirements of 42 U.S.C. § 405(g).[13] *Califano v. Yamasaki*, 442 U.S. 682, 701, 704 (1979); *Mathews v. Diaz*, 426 U.S. 67, 71 n.3 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975).

Section 405(g) provides that a claimant may obtain judicial review only after the Secretary renders a "final decision" on his application for benefits after a hearing to which he was a party. Pursuant to her rulemaking authority under 42 U.S.C. § 405(a), the Secretary has determined that a final decision is rendered on a claim under Title II or Title XVI only after the Appeals Council has either issued a decision or denied a claimant's request for review. *See, Heckler v. Ringer*, — U.S. —, 104 S.Ct. 2013 (1984); *Salfi, supra*, 422 U.S. at 765; 20 C.F.R. §§ 404.900 (a)(5), 404.981, 416.1400(a)(5), 416.1481. In short, the Secretary's regulations require full exhaustion of administrative remedies prior to judicial review.[14]

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[13] The jurisdictional requirements of § 405(g), which refers to Title II claims, are incorporated in 42 U.S.C. § 1383(c) for Title XVI claims.

[14] The exhaustion requirement of § 405(g) consists of a waivable element, discussed in the body of the opinion, and a nonwaivable requirement that a "claim for benefits shall have been presented to the Secretary." *Ringer, supra*, 104 S.Ct. at 2023, *citing Eldridge, supra*, 424 U.S. at 328. Plain-

As certified, the class included "[a]ll persons in the State of New Jersey who have filed or will file applications for disability benefits . . . and whose benefits have been or will be denied or terminated based upon a finding of no severe impairment. . . ." Order of October 9, 1985. The cutoff date for the class as now defined is July 26, 1985, so claimants who received decisions of the Secretary before that date and who failed either to file a complaint in federal district court or to appeal to the next administrative level within 60 days after receiving such decision.[15] The court notes as a preliminary matter that it may see fit to broaden or narrow the temporal scope of the class in the future.

The class includes a subclass of disability applicants who may have received a decision of the Secretary on or after July 26, 1984 and failed to appeal it within the requisite 60 days. Defendant argues strenuously that the failure to exhaust administrative remedies automatically bars those persons from inclusion in any class which may obtain injunctive relief. However, members of this subclass are properly included in the certified class because they fall within a judicially created exception to the exhaustion requirement of section 405(g).

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tiffs in this action have satisfied the presentment requirement by virtue of their applying for benefits, in the case of class members whose claims were denied, or their having applied for and received benefits in the past, in the case of class members whose benefits were terminated.

[15] The class actually includes claimants who received final administrative decisions within 65 days of the filing of the instant motions since the regulations presume that a decision is received within five days of mailing. 20 C.F.R. § 422.210(c) (1981).

The Supreme Court has held that the Secretary may waive the exhaustion requirement and that the courts are also empowered to do so in appropriate circumstances. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Diaz, supra*, 426 U.S. at 76. In permitting certification of a class of Title XVI recipients whose benefits had been reduced or terminated, the Third Circuit held that exhaustion of administrative remedies could be properly waived by the court if the legal issue presented was statutory and if the Secretary had assumed a fixed and final position. *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333, 345-46 (3rd Cir. 1977), *citing Eldridge, supra*. More recently, the Third Circuit applied *Liberty Alliance* to find § 405 (g) jurisdiction despite the lack of exhaustion of remedies by members of a proposed class. *Kuehner v. Schweiker, supra*. The majority looked at whether the Secretary had taken a fixed and final position, thereby rendering exhaustion futile. A concurring opinion by Judge Becker observed that the Supreme Court's decisions in *Eldridge* and *Salfi* had identified two further criteria: (1) the unexhausted claim must be at least substantially collateral to the question of whether plaintiffs should continue to receive disability benefits; and (2) requiring exhaustion must impose substantial hardship on, or cause irreparable harm to, plaintiffs. *Kuehner, supra*, 717 F.2d at 822.

The Secretary contends that her position on the issue of non-severe impairment is fluid, not "fixed and final," and points to her new SSR to prove her point. But the new SSR does not represent changes in the Secretary's stance toward disability claimants. It is merely a glib reformulation of policies which have been implemented for several years. In these circumstances, it should be futile to require all mem-

bers of the identified subclass to exhaust administrative remedies, despite the Secretary's protestations that certain claimants might be granted benefits were they to pursue administrative appeals.

In addition, plaintiffs have demonstrated that they will suffer irreparable harm for which *post hoc* relief would be inadequate. *See supra. Compare Dixon, supra,* slip op. at 10.

Defendant argues that the unexhausted claims are not substantially collateral but are in fact identical to plaintiffs' claims for benefits. Even if the Secretary's argument is correct, the court believes that waiver of exhaustion is nonetheless appropriate because plaintiffs have clearly satisfied the requirements of futility and irreparable harm. "[T]he core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable." *Eldridge, supra,* 424 U.S. at 331, n.11. The Supreme Court's approach is practical and its decisions do not establish whether each of the individual relevant factors must be present before a court may waive exhaustion. *City of New York v. Heckler,* 742 F.2d 729, 736 (2nd Cir. 1984), *cert. granted,* 54 U.S.L.W. 3193 (October 8, 1985), *citing Eldridge, supra,* and *Ringer, supra.*[16] Fairness and justice dictate that the

[16] The Secretary urges this court to reserve any decision on the waiver of exhaustion issue in light of the Supreme Court's decision to grant the Secretary's petition for certiorari in *City of New York v. Heckler.* The Supreme Court granted certiorari on October 7, 1985, only two days before this court heard argument and issued an order certifying the class and granting preliminary relief. Given the size of the Supreme Court's docket and the inherent delays in the appellate process,

exhaustion requirement should be deemed waived for members of the proposed class. *Compare Smith v. Schweiker*, 709 F.2d 777, 780 (2nd Cir. 1983).

V. *Conclusion*

For all the foregoing reasons, the court will grant plaintiffs' motions for preliminary injunctive relief and class certification. An order setting forth both the scope of relief and the definition of the class will be entered.

/s/ Stanley S. Brotman
STANLEY S. BROTMAN
U.S.D.J.

Dated: October 28, 1985

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that opinion could conceivably not issue for at least a year. These motions have already been pending for over a year and the court cannot in good conscience postpone its decision any longer.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-3771

JOHN WILSON and MARY CHRISTOPHER, on their own behalf, and on behalf of others similarly situated,
PLAINTIFFS

v.

HON. MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

[Filed Nov. 14, 1985]

SUPPLEMENTAL OPINION ACCOMPANYING ORDER.

BROTMAN, District Judge

On October 9, 1985, this court certified a class of New Jersey residents whose claims for disability benefits under the Supplemental Security Income ("SSI") and Old Age Survivor and Disability Insurance ("OASDI") programs have been or could be denied or terminated since July 26, 1984 solely on the basis that their medical impairments are not severe. The court also granted a preliminary injunction barring the Secretary of Health and Human Services ("Secretary") from applying the severity regulation, 20 C.F.R. § 404.1520(c), to present and future claims for benefits under Title II and Title XVI of the Social Security Act, as amended, 42 U.S.C. § 301 *et seq.*, and directing her to reopen past claims that were denied or terminated by application of that regulation. The court instructed the parties to confer and submit a joint proposed order incorporating the timetable and scope of injunctive relief.

After issuance of the court's opinion, *Wilson v. Heckler*, Civ. No. 83-3771 (D.N.J. Oct. 28, 1985), the parties submitted a partial joint proposed order for implementing preliminary relief. The parties could not agree on several points, so they have submitted separate versions of proposed paragraphs, along with supplementary letter briefs. The court has considered the options and arguments presented by the parties and is filing this supplemental opinion in order to clarify certain provisions of the accompanying final order.

Plaintiffs have asked the court to impose mandatory time limits on the Secretary with respect to sev-

eral prescribed actions: identification of class members (Order, ¶ 2);* notification of class members (¶ 3, ¶ 8(a)); completion of sequential evaluations of disability, including scheduling hearings (Plaintiffs' Proposed ¶¶ 4, 5); and issuance of compliance instructions (¶ 10). While the Secretary has submitted her estimates of reasonable time frames, which in every instance are longer than those proposed by plaintiffs, she maintains that all such mandatory deadlines are precluded by the Supreme Court's opinion in *Heckler v. Day*, —— U.S. ——, 104 S. Ct. 249 (1984).

In *Heckler v. Day*, the Court invalidated a statewide injunction issued by a district court which required the Secretary, *inter alia*, to issue reconsideration determinations within ninety (90) days of requests for reconsideration and to conduct hearings within ninety (90) days of requests for hearings. The Court held that because Congress repeatedly considered and rejected imposing mandatory deadlines on agency adjudication of disputed disability claims under Title II of the Social Security Act, "it would be an unwarranted judicial intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines with respect to future disability claims." —— U.S. ——, 104 S. Ct. at 2258. The Court's 5-4 decision made clear that it applied to injunctions issued in class actions and that injunctive relief would still be proper to remedy individual violations of 42 U.S.C. § 405(b). *Id.* at n.33.

The Circuit Courts of Appeals which have applied *Heckler v. Day* have generally followed its proscription of setting time limits on the Secretary's admin-

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* Except where noted, all references to numbered paragraphs are to the accompanying order.

istrative process. *See, e.g., Telecommunications Research & Action v. F.C.C.*, 750 F.2d 70, 81 n.44 (D.C. Cir. 1984) (granting injunctive relief in individual case); *Sierakowski v. Heckler*, 748 F.2d 115 (2nd Cir. 1984) (invalidating 165 day deadline for deciding Medicare appeals); *Hyatt v. Heckler*, 757 F.2d 1455, 1459 (4th Cir. 1985) (vacating injunction against Secretary's policy of nonacquiescence). *But see Avery v. Sec'y of Health and Human Services*, 762 F.2d 158, 164, 165 (1st Cir. 1985) (upholding mandatory time limits under 1984 Reform Act in absence of countervailing legislative history and demonstrable burden).

In the case at bar the court is faced with two distinct types of time limits. Plaintiffs seek to require the Secretary to "make all good faith efforts to complete the sequential evaluation of disability within four weeks of the date a class member's case file . . . is received . . ." (Plaintiffs' Proposed ¶ 4(a)(3)); conduct redetermination hearings within forty-five (45) days of identification of class members entitled to have their claims reopened (Plaintiffs' Proposed ¶ 4(b)); and conduct hearings in cases of class members whose claims have been remanded from federal court within seventy-five (75) days of notice of remand or eighty-five (85) days of entry of the remand order, whichever is earlier (Plaintiffs' Proposed ¶ 4(b)). These proposed deadlines directly contradict the holding of *Heckler v. Day* because they would impose time limits on the Secretary's internal administrative procedures. "In light of Congress' continuing concern that mandatory deadlines would subordinate quality to timeliness, and its recent efforts to ensure the quality of agency determinations, it hardly could have contemplated that courts should have authority to impose the very deadlines it re-

peatedly has rejected." *Heckler v. Day, supra,* —— U.S. ——, 104 S. Ct. at 2257.

Accordingly, the court will not impose the deadlines which plaintiffs proposed and to which defendant agreed. Instead, the accompanying order instructs the Secretary to use her "best efforts" to obtain, update and review vocational information and complete sequential evaluations within suggested time frames which the parties have already agreed are reasonable. Since compliance with the time frames is hoped for, but not required, the court has deleted proposed provisions that would tally cases received by the New Jersey Division of Disability Determinations ("NJDDD") in any given week as received in the following week if they exceeded a certain number. Order, ¶ 4(a). The order further directs the Secretary to use her best efforts to schedule hearings promptly and hold them within a reasonable period of time. Order, ¶ 4(b).

The other time limits proposed by plaintiffs and incorporated into the accompanying order relate not to the Secretary's procedures but to implementation of preliminary injunctive relief. Timetables for identifying class members and notifying them of their status do not conflict with *Heckler v. Day, supra. See Dixon v. Heckler,* 83 Civ. 7001 (MEL), Letter Opinion of Lasker, J. (S.D.N.Y. July 20, 1984) (discussing proposed order to be issued under *Dixon v. Heckler,* 589 F. Supp. 1494 (S.D.N.Y. 1984)). Accordingly, the court will require the Secretary to identify all class members within 120 days and notify them within twenty-one (21) days of such identification. Order, ¶¶ 2, 3. Plantiffs propose that the Secretary be required to notify all class members within ninety-five (95) days. The Secretary argues that plaintiffs' proposed time frame would impose an un-

due administrative burden on the agency which could be alleviated if an additional twenty-five (25) days were granted. The court is mindful that the agency must issue benefit checks early in December due to the holiday mail crunch and that the Secretary is already working to comply with other court orders. The Secretary states that 120 days "represents a realistic deadline which SSA will be able to meet," Defendant's Letter Brief, Nov. 6, 1985 at 3, and the court will hold the Secretary to her proposal.

The parties agreed that twenty-one (21) days was an appropriate time frame for notification, but clashed over whether the Secretary should be required to notify the claimant's representative as well as the claimant. The Secretary's own regulations provide that notice ". . . of any administrative action . . ." will be sent to a claimant's representative. 20 C.F.R. § 404.1715. In the face of the regulation's plain language, the Secretary's arguments that such a requirement would overburden her administrative staff are unavailing.

The accompanying order will apply to claimants whose claims are currently in federal court as well as to those with claims pending at various administrative levels. The class encompasses both categories and the court believes claimants with claims pending in federal court are fully entitled to notification of their status as potential members of the certified class, in addition to any and all other rights granted to other class members. Any objection that such federal cases should not be subject to the proposed hearing deadlines is rendered moot by the court's decision, pursuant to *Heckler v. Day*, *supra*, not to impose deadlines at that stage.

The Secretary and plaintiffs propose different timetables for issuing instructions for compliance with

the accompanying order. Plaintiffs suggest that such instructions should be issued within fifteen (15) days of the date of the accompanying order. The Secretary contends that the delays inherent in the printing process make forty-five (45) days a more realistic projection. The printing process alone, the Secretary claims, can take as long as twenty-one (21) days. The court believes that the Secretary should be able to draft and review instructions within twenty-one (21) days and disseminate typewritten copies of those instructions by mail or telecopier pending issuance of the final, printed version. Therefore, the court will order that the Secretary disseminate instructions in provisional form within twenty-one (21) days and circulate a final, printed version within forty-five (45) days. Order, ¶ 10.

The final issue on which the parties could not agree is monitoring. The basic monitoring information requested by plaintiffs is essential to track the Secretary's compliance efforts. Particularly in light of the court's inability to impose mandatory deadlines on the hearing process, plaintiffs' counsel must be supplied with frequent and accurate reports on the status of certain claims and the Secretary's progress. The court must rely on plaintiffs' counsel to alert it to any instances of apparent noncompliance with the accompanying order. For these reasons, the court will adopt the timetable suggested by plaintiffs, modified to reflect the court's adoption of defendant's 120 day limit for notifying potential class members.

The accompanying order will be entered and should be interpreted in light of this opinion.

/s/ Stanley S. Brotman
STANLEY S. BROTMAN
U.S.D.J.

Dated: November 14, 1985

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 83-3771

JOHN WILSON and MARY CHRISTOPHER, on their own behalf, and on behalf of others similarly situated,
PLAINTIFFS

v.

HON. MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

[Filed Nov. 14, 1985]

ORDER CERTIFYING CLASS AND GRANTING PRELIMINARY INJUNCTION

This matter being brought before the court by Richard E. Yaskin, Esquire, of Jacobs & Schwalbe, P.C., attorneys for the plaintiff class, and the court having considered the submissions and arguments of the parties:

It is on this 14th day of November, 1985, hereby ORDERED that plaintiffs may maintain this action as a class action pursuant to Fed. R. Civ. P. 23(a) and (b)(2), the class being defined as follows:

All persons in the State of New Jersey who have filed or will file applications for disability benefits under Title II and/or Title XVI of the Social Security Act, as amended, and whose benefits have been or will be denied or terminated based upon a finding of no severe impairment pursuant to the policies set forth in 20 C.F.R. §§ 404.1520(c) and .1521, 416.920(c) and .921 (1983), and Social Security Ruling 82-55 (1982).

The plaintiff class does not include, at this time, any such persons who received decisions of the Secretary on or before July 25, 1984 and who failed either to file a complaint in federal district court or to appeal to the next level of administrative review within 60 days after the date of receipt of such decision.

For purposes of determining class membership, the term "person in the State of New Jersey" is defined as an individual who was domiciled in the State of New Jersey at the time of his or her most recent administrative decision.

For purposes of determining whether disability was denied or terminated based on a finding of no severe impairment, the rationale of the final agency denial shall be controlling *except* that the rationale of the Administrative Law Judge shall be controlling where the Appeals Council denies review and has not initiated review on its own motion pursuant to 20 C.F.R. § 404.969 (1983).

It is FURTHER ORDERED that plaintiffs' motion for a preliminary injunction is GRANTED and that, pending a final determination of this action, defendant, her agents, servants, employees and their successors:

1. Are enjoined from denying or terminating Social Security Disability or Supplemental Security Income benefits due to the policies set forth in 20 C.F.R. §§ 404.1520(c) and .1521, 416.920(c) and .921 (1983), and Social Security Ruling 82-55 (1982); and

2. Shall immediately commence identification of all members of the plaintiff class. Defendant shall complete identification of the members of the class within 120 days of the date of this order; and

3. Shall send to each class member whose application for benefits was denied and his/her representative, a copy of the notice appended hereto as Attachment "A". Notification of class members shall be completed within twenty-one (21) days of the date defendant identifies the class member; and

4. Are directed to reopen the applications of all class members whose applications for benefits have been denied or terminated by the Secretary at any stage of the administrative process, since July 26, 1984 and thereafter, and to redetermine those applications without reference to the threshold severity test, provided that any action pending in federal court based upon the denial of a class member's application for benefits has been remanded to the Secretary for redetermination.

(a) With respect to class members whose applications for disability benefits have been denied at the initial administrative stage or on reconsideration and who have not requested review by an Administrative Law Judge:

(1) Defendant shall forthwith obtain information on the individual's vocational history, including completion of Form SSA-3369 if appropriate or updating the prior vocational history

on file. Defendant shall use its best efforts to obtain or update vocational information within one week after the class member responds to the notice appended here to as Attachment "A" or is otherwise determined to be a class member.

(2) Defendant shall forward the class member's file to the New Jersey Division of Disability Determinations ("NJDDD") for a new initial determination within three days of (i) obtaining appropriate vocational information pursuant to sub-paragraph (a)(1), or (ii) receipt of the claims folder by the District Office with jurisdiction over the claim, whichever is later. Defendant shall make its best efforts to deliver to the District Office fifty percent (50%) of the claims files within two weeks, sixty-five percent (65%) of the claims files within three weeks and eighty percent (80%) of the claims files within thirty days after the class member responds to Attachment "A" or is determined to be a class member. Defendant shall begin reconstructing the files of all class members whose claims files are not received by the appropriate District Office within four months after the class member responds to Attachment "A" or is determined to be a class member, whichever is earlier.

(3) Defendant shall make all good faith efforts to complete the sequential evaluation of disability within four weeks of the date a class member's case file and completed Form SSA-3369 are received by NJDDD unless the class member submits new medical evidence, requests a full redevelopment of evidence and reevaluation of disability, or defendant determines that a full redevelopment is required. Nothing

in this order shall preclude defendant from employing the quality assurance process set forth in 42 U.S.C. § 421(c)(3) in each individual class member's case to the extent defendant seems appropriate.

(b) In conducting the redetermination of those applications in which a hearing has been held or in which a request for hearing is pending, defendant shall conduct a hearing before an Administrative Law Judge unless a determination of entitlement can be made on the basis of the record. The Secretary shall use her best efforts to schedule such hearings promptly and hold them within a reasonable period of time.

5. With respect to those class members who have actions pending in federal court and either have informed the Secretary that they want their case remanded to the Secretary for a reevaluation or have failed to so inform the Secretary by responding to the notice appended here to as Attachment "A" within thirty (30) days of the date of the notice, the Secretary shall move the court for or otherwise agree to a remand of the case; and

6. Shall provide to any person who presents him/herself in person, by telephone or by letter to the Social Security Administration for relief under this order and, at the time of such presentment provides his/her name, Social Security number, telephone number and current address, a copy of the notice appended hereto as Attachment "B", stamped by the Social Security Administration personnel to indicate the date of his/her presentment. A copy of the notice shall be placed in that person's file if that person in fact has applied for or been terminated from benefits. Upon such presentment, defendant shall within

thirty (30) days, determine whether such person is a class member and shall provide a written rationale for such determination; and

7. Shall reproduce, in both the English and Spanish languages, the notice appended hereto as Attachment "C" as a 17 inch by 22 inch poster and cause equal numbers of English and Spanish language copies of such poster to be prominently displayed in all Social Security Administration field, district, and hearing offices in the State of New Jersey to which the public has access, shall supply plaintiffs' attorneys with fifty (50) copies of said poster in the English language and twenty-five (25) copies of said poster in the Spanish language; and

8. (a) In the event a class member fails to respond to notice "A" and said notice is not returned by the Post Office, defendant shall make all good faith efforts to send a final notice to the class member advising him or her of the availability of relief under this order within seventy-five (75) days of the date notice "A" is sent. Said final notice shall contain a form which will allow the class member to indicate whether he or she intends to pursue the relief provided for by this order and shall be accompained by an addressed, postage-paid envelope. Upon sending the final notice, defendant shall have no further obligation to contact the class member.

(b) In the event that a notice sent to a class member is returned by the Post Office, defendant shall follow standard operating procedures in the Program Operations Manual (POMS, DI 00504.047) to ascertain the individual's current address or whereabouts for purposes of sending a final notice. If still unsuccessful upon completing these efforts, defendant may cease efforts to locate the class member. Should

the class member come to defendant's attention, defendant shall provide the class member with all the rights under the order for class members who respond to Attachment "A"; and

9. Shall immediately issue instructions to the Social Security offices in the State of New Jersey, to the Office of Hearings and Appeals, to the Appeals Council, to the Regional Office, having jurisdiction over New Jersey, and to the New Jersey Division of Disability Determination, requiring compliance with paragraph (1).

10. Shall, within twenty-one (21) days of the date of this order, issue provisional instructions for compliance with this order, including procedures to be used in identifying class members, responding to inquiries from asserted class members and their representatives, for reevaluating initial claims of plaintiff class members who have been denied or terminated at the initial administrative state or on reconsideration. Such provisional instructions shall be disseminated in typewritten form by mail or telecopier. Final printed instructions shall be issued within forty-five (45) days of the date of this order, but they shall not differ in content from the provisional instructions; and

11. Shall immediately provide plaintiffs' counsel with copies of all memoranda, notices, instructions, directives and like documents issued to effect compliance with this order as those documents are issued; and

12. Plaintiffs seek the following reports to be provided within the time frames specified:

(a) An alphabetized list of the names and Social Security numbers of class members who have been identified (within 130 days and supplemented every

forty-five (45) days until defendant's efforts to identify class members have ceased); and

(b)-(1) An alphabetized list of the names and Social Security numbers of persons who cannot be notified because their notices were returned by the Post Office (within 155 days and supplemented every forty-five (45) days until defendant's efforts to notify class members pursuant to Paragraph 8(b) have ceased); and

(2) An alphabetized list of the names and Social Security numbers of persons who have been notified, but failed to respond to Attachment "A" (within 175 days and supplemented every forty-five (45) days until the District Office ceases to maintain an active file due to the class member's failure to respond to, or negative response to, the final followup notice of Paragraph 8(a); and

(c) The number of class members identified (within 130 days and supplemented every forty-five (45) days until defendant's efforts to identify class members have ceased); and

(d) The number of class members sent Attachment "A" and the number responding to such notice (within 175 days and supplemented every forty-five (45) days until defendant's efforts to contact class members who are sent Attachment "A" have ceased); and

(e) The number of cases ordered forwarded to NJDDD (on a monthly basis); and

(f) The number of persons who have presented themselves as potential class members, and the number determined to be class members; and the number determined not to be class members (on a monthly basis); and

(g) the number of cases that have been scheduled for hearings, and the number of hearings that have been conducted (on a monthly basis); and

(h) The number of redeterminations of applications that result in allowances and the number that result in denials (on a monthly basis); and

(i) The total number of folders that have not been located (every 45 days); and

(j) The total number of claimants who have submitted vocational and/or financial information, and whose folders have not been located (every 45 days); and

(k) The number of cases that have been placed in the quality assurance process (every 45 days); and

(l) The number of cases for which the quality assurance process has been completed (every 45 days); and

(m) The number of cases in which the quality assurance process resulted in an initial disagreement by defendant, with the decision of NJDDD, reported separately for denials and allowances (every 45 days).

13. The Secretary may petition the court anytime for relief from any one or more of the provisions of paragraph 12, above. Such relief will be granted upon the showing made by the Secretary and a determination of the court that the implementation of this order is proceeding smoothly and that the information called for in the particular provision or provisions from which the Secretary seeks relief is no longer needed or upon a showing and a determination of the Court that such relief is otherwise appropriate.

14. Nothing in this order shall be construed as precluding members of the plaintiff class from obtaining greater relief on alternative grounds within the sequential evaluation process. Class members shall retain all rights to administrative and judicial review of decisions made as a consequence of this order. Nothing in this order shall be construed as precluding class members who choose to proceed with their individual court cases from seeking preliminary relief in those cases.

/s/ Stanley S. Brotman
STANLEY S. BROTMAN
U.S.D.J.

ATTACHMENT A

SOCIAL SECURITY DISABILITY AND SUPPLEMENTAL SECURITY INCOME APPLICANTS, THEIR REPRESENTATIVES AND REPRESENTATIVE PAYEES

Date: _____

Based on our review of your file, it appears that you may have been denied benefits because we found that your medical condition was not severe. A federal court has temporarily ordered us not to deny benefits on that ground and to reopen and redetermine certain applications denied on that ground.

If we review your case, we will need more information from you. Therefore, you should go to or telephone your local Social Security Administration office, and be prepared to give them information about your employment history. If you go to your local Social Security Administration office in person, please take this notice with you.

If we determine your application, our decision will be based upon the medical evidence that we now have in our file, unless you give us additional medical evidence. If you believe that your medical condition has changed since we last evaluated your claim, you should make a *special effort* to obtain and give us additional medical evidence from your doctor(s) and any clinics or hospitals where you have received treatment.

IT IS OF GREAT IMPORTANCE THAT YOU CONTACT YOUR LOCAL SOCIAL SECURITY ADMINISTRATION OFFICE WITHIN FORTY-FIVE (45) DAYS SO THAT WE MAY REDETERMINE YOUR CASE.

PERSONS WITH CASES IN FEDERAL COURT

If you have an action pending in federal court based upon the denial of your application, we cannot redetermine this application unless and until the court sends your case back to us. You may alternatively have the right to continue with your court action. ~~No~~ request that you indicate below whether you want to send your case back to us for determination.

Please place your name, signature, Social Security number, address, telephone number and date in the spaces provided. Please tear off the form below and return in the enclosed addressed, postage-paid envelope within twenty (20) days after the date you receive this notice. If we do not hear from you within thirty (30) days of the date of this notice, we will assume that you do not want to continue with your court action, and we will ask the court to send your case back to us for redetermination.

Date: _____

_____ I want to continue my court action. I do not want the Social Security Administration to redetermine my application for benefits.

_____ I do not want to continue with my court action. I want the Social Security Administration to redetermine my application for benefits.

NAME: (Please Print) _____

SIGNATURE: _____

SOCIAL SECURITY NO.: _____

ADDRESS: (Please Print) _____

_____

TELEPHONE NUMBER: _____

DATE: _____

ATTACHMENT B

WILSON APPLICATION

Date: _____

This acknowledges presentment on this date of your claim for relief under *Wilson v. Heckler*, Civil Action No. 83-3771 (D.N.J. October 28, 1985). If you are a member of the class of plaintiffs in this lawsuit and are entitled to relief, the Social Security Administration will be reviewing your application if you were denied or terminated disability insurance and/or SSI benefits.

NAME: (Please Print) _____

SOCIAL SEURITY NUMBER: _____

ADDRESS: (Please Print) _____

_____

TELEPHONE NUMBER: _____

The class of plaintiffs in *Wilson v. Heckler*, No. 83-3771 (D.N.J. October 28, 1985), includes people who:

1. Were denied or terminated from disability insurance and/or SSI benefits on or after July 26, 1984 or who had an appeal pending on that date; *and*

2. Were denied or terminated because the Social Security Administration found that their medical condition was "not severe" or did not "significantly limit physical or mental abilities to do work activities."

We will decide whether you are a member of the class of plaintiffs in *Wilson v. Heckler* within about thirty (30) days of the date of this notice.

ATTACHMENT C

SOCIAL SECURITY DISABILITY AND SUPPLEMENTAL SECURITY INCOME DISABILITY APPLICANTS AND RECIPIENTS

HAS THE SOCIAL SECURITY ADMINISTRATION DENIED OR TERMINATED YOUR DISABILITY BENEFITS? IF SO, YOU MAY BE ENTITLED TO A NEW REVIEW OF YOUR CASE

Because of a lawsuit, the Social Security Administration may have to reevaluate your application for benefits. The lawsuit affects people in the State of New Jersey who were denied or terminated benefits because the Social Security Administration found that their medical condition was not severe.

CAN YOU ANSWER YES TO THESE QUESTION?

1. Were you denied or terminated from disability benefits on or after July 26, 1984, or did you have an appeal pending within the Social Security Administration or in federal court on that date?

2. Do you think your benefits were denied or terminated because the Social Security Administration found that your medical condition was "not severe" or because it found that your medical condition did not "significantly limit your physical or mental abilities to do basic work-related activities"

If you said yes to both of the above questions, don't delay. Contact your local Social Security office immediately. Be prepared to give them your name, Social Security number, current address and telephone number. Ask for a *Wilson Application.*

APPENDIX I

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 223(d)(1)(A) and (2)(A) of the Social Security Act, as codified at 42 U.S.C. (& Supp. II) 423(d)(1)(A) and (2)(A), provides:

(d) "Disability" defined

(1) The term "disability" means—

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; * * *

* * * * *

(2) For purposes of paragraph (1)(A)—

(A) an individual (except a widow, surviving divorced wife, widower, or surviving divorced husband for purposes of section 402(e) or (f) of this title) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in signifi-

cant numbers either in the region where such individual lives or in several regions of the country.

2. Section 1614(a)(3)(A) and (B) of the Social Security Act, as codified at 42 U.S.C. 1382c(a)(3)(A) and (B), provides:

(3)(A) An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

(B) For purpose of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

3. Section 223(d)(2)(C) of the Social Security Act, as added by Section 4(a)(1) of the Social Security Disability Benefit Reform Act of 1984, Pub.

L. No. 98-460, 98 Stat. 1800 (42 U.S.C. (Supp. II) 423(d)(2)(C)), provides:

"(C) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effects of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impacts of the impairments shall be considered throughout the disability determination process."

4. Section 1614(a)(3)(G) of the Social Security Act, as added by Section 4(b) of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1800 (42 U.S.C. (Supp. II) 1382c (a)(3)(G)), provides:

"(G) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process."

5. 20 C.F.R. 404.1520 and 404.1521 provide:

§ 404.1520 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled.

If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing any other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

§ 404.1521 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

6. 20 C.F.R. 416.920 and 416.921 provide:

§ 416.920 Evaluation of disability in general.

(a) *Steps in evaluating disability.* We consider all material facts to determine whether you are disabled. If you are doing substantial gainful activity, we will determine that you are not disabled. If you are not doing substantial gainful activity, we will first consider your physical or mental impairment(s). Your impairment(s) must be severe and meet the duration requirement before we can find you to be disabled. We follow a set order to determine whether you are disabled. We review any current work activity, the severity of your impairment(s), your residual functional capacity and your age, education, and work experience. If we can find that you are disabled or not disabled at any point in the review, we do not review further.

(b) *If you are working.* If you are working and the work you are doing is substantial gainful activity, we find that you are not disabled regardless of your mental condition or your age, education, and work experience.

(c) *You must have a severe impairment.* If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and

are, therefore, not disabled. We will not consider your age, education, and work experience.

(d) *When your impairment(s) meets or equals a listed impairment in Appendix 1.* If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.

(e) *Your impairment(s) must prevent you from doing past relevant work.* If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.

(f) *Your impairment(s) must prevent you from doing other work.* (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.

(2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 416.962).

[50 FR 8728, Mar. 5, 1985]

§ 416.921 What we mean by an impairment(s) that is not severe.

(a) *Non-severe impairment(s).* An impairment or combination of impairments is not severe if it

does not significantly limit your physical or mental ability to do basic work activities.

(b) *Basic work activities.* When we talk about basic work activities, we mean the abilities and aptitudes necessary to do most jobs. Examples of these include—

(1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

(2) Capacities for seeing, hearing, and speaking;

(3) Understanding, carrying out, and remembering simple instructions;

(4) Use of judgment;

(5) Responding appropriately to supervision, coworkers and usual work situations; and

(6) Dealing with changes in a routine work setting.

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Supreme Court, U.S.
FILED
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CLERK

(2)

No. 86-897

In The
Supreme Court of the United States
October Term, 1986

OTIS B. BOWEN, as Secretary of Health and Human Services,

Petitioner,

vs.

JOHN WILSON and MARY I. CHRISTOPHER, individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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No. 86-897

In The
Supreme Court of the United States
October Term, 1986

OTIS B. BOWEN, as Secretary of Health and Human Services,

Petitioner,

vs.

JOHN WILSON and MARY I. CHRISTOPHER, individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Petitioner, the Secretary of Health and Human Services, requests that his petition for Writ of Certiorari be granted pending the Court's decision in *Bowen v. Yuckert, cert. granted,* 54 U.S.L.W. 3573 (May 20, 1986) (No. 85-

1409). (Pet. at 15). This request should be denied because the issue on which the Secretary sought and obtained review in *Yuckert* has no bearing on the validity of the preliminary injunction in this case.

SUMMARY OF ARGUMENT

In *Yuckert,* the Secretary represented to this Court that thre was no need for a factual record regarding the issues in that case because *Yuckert* raised solely the facial validity of the severity regulation. (*Yuckert* Reply Br. at 1). Because this case challenges the Secretary's practices in applying the severity regulation, resolution of the issue the Secretary presents in *Yuckert* will not dispose of the issues presented here. Every Court of Appeals that has considered the question has recognized that the legality of a severity rule that operates as more than a de minimis screening device is a separate question from the validity of a de minimis rule permitting screening of claims without full vocational evaluations. These courts have all held that the Secretary cannot deny benefits on medical grounds alone, with a rule that is not de minimis. In this case, the District Court made a preliminary finding that, in practice, the Secretary applies the severity regulation as more than a de minimis threshold, and this finding was affirmed on appeal. Accordingly the judgment below will stand regardless of the Court's disposition of *Yuckert.*

Furthermore, the preliminary stage of the proceedings in this case strongly counsels against reviewing or

vacating the injunction issued below. At this stage, the parties have not yet completed discovery and the District Court has neither made final factual findings, not crafted the terms of a final injunction. As this case proceeds to trial on the merits, the Secretary will have ample opportunity to introduce any relevant evidence and to propose any appropriate form of injunction. The Secretary has made no showing that he would be prejudiced by awaiting such resolution in the District Court. Accordingly, certiorari should be denied at this stage in this litigation and the preliminary injunction should not be disturbed.

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REASONS WHY THE PETITION SHOULD BE DENIED

A. Resolution Of Yuckert In The Secretary's Favor Would Not Dispose Of The Issues Presented Here.

The Secretary's argument that the petition here should be held and disposed of in light of the Court's Opinion in *Yuckert* rests on the conclusory assertion that "[i]f the Court sustains the severity regulation in *Yuckert,* the preliminary injunction in this case must be rereversed on the merits . . . " (Pet. at 15) This assertion is disingenuous in light of the Secretary's own statements to this Court in *Yuckert.* In response to Yuckert's argument that the absence of an adequate factual record in that case made review inappropriate, the Secretary assured the Court that "[t]his case presents a single and straightforward question of law:

> [w]hether the 'severity' regulation promulgated by the Secretary of Health and Human Services . . . is invalid on its face. (*Yuckert* Reply Br. at 1).

The Secretary cannot have it both ways. Having sought review in *Yuckert* by claiming that the case only presented the issue of the severity regulation's facial validity, he cannot now claim that a decision in that case will dispose of a fact-based challenge to the application of his severity regulation.

Resolution of the instant case depends upon just such factual questions concerning the regulation's application. It is true that the District Court below held that plaintiffs had established a likelihood of demonstrating the facial invalidity of the severity regulation in light of *Baeder v. Heckler,* 768 F. 2d 547 (3d Cir. 1985). *Baeder* and the District Court below each assumed that were the Secretary to apply the severity regulation in a true de minimis fashion, it might implicitly consider vocational factors and be consistent with the Statute. *See Baeder,* 768 F. 2d at 552. However, "Because the [*Baeder*] court expressly found that the Secretary was not applying the severity regulation as a de minimis requirement, it did not hesitate to invalidate the regulation." *Wilson v. Heckler,* 622 F. Supp. 649, 652 (D.N.J. 1985) *aff'd as modified,* 796 F. 2d 36 (3d Cir. 1986).

The Third Circuit in *Baeder* summarized the reasons for holding the severity regulation invalid as it was applied:

> When she denies benefits to persons with medical problems of the degree experienced by Baeder, without any evaluation of his vocational characteristics, as well as 40 percent of all other applicants, we will not hear the Secretary define a 'non-severe' impairment as one which may never justify a finding that the person cannot work. *Baeder,* 768 F. 2d at 553.

The court cited statistical evidence showing an increase in denials on the basis of medical factors alone from 8.4 percent in 1975 to 40.3 percent in 1982. *Id.* at 552. (citation omitted)

In affirming the preliminary injunction of the District Court below, the Third Circuit again acknowledged that a narrow interpretation of the severity regulation "read to apply only to applicants whose impairments could never prevent them from working", may be found to contain implicit consideration of vocational factors as required by the Social Security Act. *Wilson,* 796 F. 2d 36, 41 (3d Cir. 1986), citing *Baeder,* 768 F. 2d at 552. The Third Circuit considered the newly issued SSR 85-28 and affirmed the District Court's refusal to allow the continued application of the severity regulation:

> . . . [i]n light of the history of the severity regulations and statistical evidence of their application, the *Baeder* Court decided against permitting such a tenuous accommodation of the Act's mandate. Thus, the District Court correctly concluded that *Baeder* did not present the Secretary with an opportunity to develop a de minimis standard, as SSR 85-28 attempts to do.

Wilson, 796 F. 2d at 41-42 (footnote and citation omitted).

Thus, even if the Secretary fully achieves the result he seeks in *Yuckert*—this Court's agreement that he may apply his severity regulation to "screen out" those claimants whose impairments are so minimal that they "would not be found disabled at subsequent steps of the sequential evaluation process in any event" (*Yuckert* Pet. at 23-24)—the preliminary injunction below would stand on the finding of the District Court and Third Circuit that

the Secretary has, in fact, applied the severity step as an independent and unauthorized eligibility restriction.

B. Regardless Of The Outcome In Yuckert, There Is No Basis For Disturbing The Court Of Appeals' Ruling Upholding The Preliminary Injunction Entered By The District Court.

The Preliminary Injunction entered by the District Court rests in part on the finding that the Secretary has applied the severity regulation as an independent eligibility restriction rather than as a device to screen meritless claims. The District Court proceeded to find that plaintiffs were likely to succeed in their challenge to the Secretary's restrictive severity practices and that plaintiffs were suffering irreparable harm from these practices. Applying the appropriate standard of review, the Court of Appeals upheld the preliminary injunction as a proper exercise of judicial discretion. As there is no real dispute as to the legal conclusions and factual findings that support the preliminary injunction, there is no basis for either granting plenary review or summarily vacating and remanding the injunction in light of this Court's decision in *Yuckert*.

1. The issue whether the Social Security Act permits a severity test that is more than a de minimis screening device is clearly not worthy of Supreme Court review. All ten Circuit Courts of Appeals that have addressed the "severity" issue have held that the Social Security Act precludes a medical threshold test that permits summary

denial of claims involving more than a de minimis or slight impairment.[1]

Although these courts differ as to whether the proper remedy is to impose a narrow construction on the severity regulations or enjoin its use in its current form altogether, all have condemned the Secretary's imposition of a substantive medical threshold that bars claims of individuals who would otherwise be adjudged disabled.

2. The factual question whether the Secretary has applied more than a de minimis threshold is not properly subject to review, given the preliminary stage of the proceedings below and the deferential standard for reviewing factual findings by lower courts. Moreover, the Secretary himself, has characterized the severity regulations as more than a de minimis threshold test in several court proceedings. *See e.g. Stone v. Heckler*, 752 F. 2d at 1103; *Salmi v. Secretary of Health and Human Services*, 774 F. 2d at 690; *Garza v. Heckler*, 771 F. 2d 871 (5th Cir. 1985).

3. The District Court acted well within its authority in ruling on the form of the injunction. Judge Brotman had before him substantial uncontroverted evidence

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1. *MacDonald v. Secretary of Health and Human Services*, 795 F. 2d 1118 (1st Cir. 1986); *Wilson v. Secretary of Health and Human Services*, 796 F. 2d 36 (3d Cir. 1986); *Evans v. Heckler*, 734 F. 2d 1012 (4th Cir. 1984); *Stone v. Heckler*, 752 F. 2d 1099 (5th Cir. 1985); *Salmi v. Secretary of Health and Human Services*, 774 F. 2d 685 (6th Cir. 1985); *Johnson v. Heckler*, 769 F. 2d 1202 (7th Cir. 1985), *petition for cert. pending*, No. 85-1442; *Brown v. Heckler*, 786 F. 2d 1870 (8th Cir. 1986); *Yuckert v. Heckler*, 774 F. 2d 1365 (9th Cir. 1985), *cert. granted sub nom, Bowen v. Yuckert*, No. 85-1409; *Hansen v. Heckler*, 783 F. 2d 170 (10th Cir. 1986); *Brady v. Heckler*, 724 F. 2d 914 (11th Cir. 1984).

that the Secretary interpreted and applied the severity regulation as a harsh substantive standard that denied benefits to claimants who were, in fact, disabled. *See Wilson*, 622 F. Supp. at 625. (February 1, 1985 Opinion and Order allowing plaintiffs to incorporate new documentary materials into the record).[2] The injunction properly enjoins continued denial of disability claims based on these policies, and requires readjudication of claims which were improperly rejected under the enjoined policies.[3]

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2. The documentary materials incorporated into the record below were obtained through discovery in *Dixon v. Heckler*, 589 F. Supp. 1494 (S.D.N.Y. 1984) aff'd. 785 F. 2d 1102 (2d Cir. 1986), *petition for cert. pending*, No. 86-2. A summary of the significant documentary materials is contained in the *Dixon* Op. Cert. Brief at 3-7 and a copy of the *Dixon* Joint Appendix has been lodged with this Court.

3. In criticizing (without seeking review of) the Class Certification Order, the Secretary mischaracterizes the impact of *Bowen v. City of New York*, No. 84-1923 (U.S., June 2, 1986). For purposes of administrative exhaustion, there is no substantial distinction between the covert policies in *City of New York* and the misrepresentation of a heightened medical severity threshold. The Secretary inaccurately assured the public that a 1978 change of regulatory language was simply a "technical clarification", that did not differ in substance from the previous "slightness" standard. *See* 43 Fed. Reg. 92, 96-97 (1978). Moreover, the covert policies revealed in *City of New York* were not relied upon to waive administrative exhaustion for those claimants who still had an opportunity to exhaust administrative remedies after the litigation was commenced. Instead, collateralness was satisfied for this sub-class because:

> [T]he claims in this lawsuit are collateral to the claims for benefits that class members had presented administratively. The class members neither sought nor were awarded benefits in the District Court, but rather challenged the Secretary's failure to follow the applicable regulations. *City of New York*, slip op. at 15.

(Continued on following page)

4. The issuance of Social Security Rulings 85-28 and 86-8 and the "obsoletion" of Social Security Ruling 82-55, provide no basis for disturbing the preliminary injunction. These administrative actions were found inadequate by the District Court and Court of Appeals for continuing to interpret an unreasonably high medical severity threshold. The Third Circuit properly relied upon the history of the severity regulation, in which the public was misled as to the initiation of a heightened medical threshold test, in rejecting "such a tenuous accommodation of the Act's mandate." *See Wilson,* 796 F. 2d at 41; *Baeder,* 768 F. 2d at 552. The policies stated in the Rulings are ambiguous and do not clearly abandon the Secretary's prior practice of refusing to consider past work. Instead, they promise to consider past work only when the work was "unique".

Courts disagree as to whether this language actually embraces the rule of all twelve circuits that a claimant makes out a prima facie case by showing an inability to return to past work. Compare *MacDonald v. Secretary*

(Continued from previous page)

Both cases concern a policy denying claimants their right to a full sequential evaluation pursuant to a rule initially implemented through quality assurance returns and actively hidden from public view. The Court should be especially sensitive to the findings of irreparable harm, including foregoing of medical care (33a-35a), in the face of a Government request to have claimants exhaust administrative remedies "merely to enable them to receive the procedure they should have been afforded in the first place." *See City of New York,* slip op. at 16.

The Secretary's reliance on *Heckler v. Redbud Hospital District,* 54 U.S.L.W. 3027 (U.S. July 30, 1985) is misplaced. In *Redbud,* Justice Rehnquist stayed a preliminary injunction requiring issuance of nationwide regulations. He left in place those provisions of the preliminary injunction requiring application of proper standards in determining reimbursement rates.

of Health and Human Services, 795 F. 2d at 1125, with *Hansen v. Heckler,* 783 F. 2d at 175. Further District Court review of the Secretary's instructional materials, quality assurance returns and other factual matters would be necessary, should this Court provide the Secretary with any discretion to interpret the severity regulation through internal rulings.

In a case in which a court is asked to permanently enjoin practices that may have been abandoned in the course of litigation, the District Court must initially evaluate any evidence that the Secretary proffers that he has abandoned his illegal past practices and is unlikely to return to them following vacatur or modification of the injunction. *See City of Mesquite v. Aladdin's Castle, Inc.,* 445 U.S. 283, 289 and n. 10 (1982). In this case, the District Court must consider the ease with which the Secretary may issue and formally "obsolete" Social Security Rulings and the Secretary's past pattern of stating one rule publicly while implementing another internally. The District Court would also consider the relevance of the Secretary's failure to employ formal rulemaking procedures, in light of his statutory obligation to follow rulemaking procedures on matters relating to disability. *See* 42 U.S.C., Section 421(k)(2).[4] These matters are properly addressed

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4. As noted in *Heckler v. Campbell,* 461 U.S. 458, 470 (1983), formal rulemaking provides an essential procedural safeguard when the Secretary seeks to dispense with individualized adjudication. The Secretary has never submitted his assumptions about the availability of jobs for persons with "non-severe" impairments to this process. He suggests that a non-expert adjudicator can simply estimate that an impairment(s) is so insignificant that it would not prevent anyone from engaging in substantial gainful activity, irrespective of age, education, and work experience.

by the District Court on appropriate motion or following a trial on the merits.

C. The Secretary Has Made No Showing That He Would Be Prejudiced By Awaiting A Final Trial On The Merits.

Because the injunction entered below is a preliminary injunction, the Secretary remains free to present any additional facts or arguments at the final trial on the merits. In addition, the Secretary may return to the District Court to present any proposals for modification of the injunction. The Secretary has made no showing that he would be prejudiced by pursing his claims in that forum. In contrast, vacatur of the injunction would remove protections ordered by the District Court and cause harm to members of the plaintiff class.

The Secretary erroneously suggests that the injunctive relief to class members whose claims were previously adjudicated is not relevant to the disposition of his petition because this relief "has now been largely completed". (Pet. at 15) The relief ordered below "has now been largely completed" only as a result of the injunction below. If the injunction were reversed, at least some class members would lose their rights to readjudication. This result would be clearly wrong since the Secretary did not dispute below that class members whose claims were adjudicated prior to the promulgation of SSR 85-28 and the "obsoletion" of SSR 82-55 were adjudicated improperly. Indeed, the Secretary is not even seeking review of the propriety of these persons being included in the plaintiff class.

The injunction below also provides class members with crucial relief from any ongoing application of an illegal

severity standard. As respondents set forth above, the record thus far in this case, provides substantial evidence that the Secretary has applied an illegal medical threshold test. The District Court's injunction prevents hardship to class members by halting these practices and assuring that class members will not have to take each case individually to court in order to obtain proper adjudication of their claims. It does not, however, in any way alter the ultimate standards for determining disability.

CONCLUSION

For the above stated reasons, the petition for certiorari should be denied, irrespective of this Court's disposition of *Bowen v. Yuckert,* No. 85-1409.

Respectfully submitted,

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